VOLUME I

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1964

No. 345

MARYLAND, FOR THE USE OF NADINE Y. LEVIN, SYDNEY L. JOHNS, ET AL., PETITIONERS,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 3, 1964

CERTIORARI GRANTED OCTOBER 19, 1964

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IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

C. A. No. 17503

STATE OF MARYLAND for the use of NADINE Y. LEVIN, individually, and as next friend, mother and guardian of and for the use of JOY ELLEN LEVIN, an infant under the age of 14 years; and MELLON NATIONAL BANK AND TRUST COMPANY as Executor of the Estate of JACK LEVIN, deceased,

vs.

UNITED STATES OF AMERICA.

RELEVANT DOCKET ENTRIES

1958

Dec. 22 Complaint filed.

• • •

1959

• • •

Feb. 4 Answer of Capital Airlines, Inc., filed by Deft. with acceptance of service thereon.

Feb. 20 Stipulation filed and Order entered extending time for deft. United States to answer to 3/10/59. (Sorg, J.)

Feb. 26 Answer of Deft. U. S. of America filed.

• • •

July 16 Stipulation and Order entered allowing pltfs. to file an amended complaint and granting defts. a period not less than 30 days within which to answer. (Miller, J.)

July 16 Amended Complaint filed.

Aug. 12 Answer of defendant, United States of America, to Amended Complaint, filed.

1959

Sept. 28 Interrogatories filed by pltf.

• • •

Dec. 11 Deft.'s objection to certain of pltfs.' interrogs.

Dec. 11 Answer of United States to Pltfs.' Interrogs.

• • •

1960

Jan. 8 Acceptance of service and Notice of taking deposition of Julius R. McCoy, filed by counsel for plaintiffs.

Feb. 10 Notice of taking Depositions filed with acceptance of service thereon.

• • •

Apr. 28 Petition filed and Order entered, with consent thereon, continuing case to 7/1/60 (Gourley, J.).

May 18 Notice of Taking Depositions of Richard S. Ackerman, Lawrence M. Scott, Charles A. Floyd, and Charles A. Laymen filed by pltf. with acceptance of service thereon.

• • •

July 22 Notice of Depositions to be taken of Major General Winston P. Wilson, Lt. Colonel Irvin E.

[fol. B]

Elbaugh, and Captain Robert H. Seabolt filed by U. S.

Dec. 30 Notice of Depositions to be taken of defts, Capital Airlines, Inc., by James P. Franklin, W. E. McMulkin, Louis Hagler, P. E. Williams, T. L. Vorney, Paul Breslin, Ralph Stavell, Steve Szalma, Everett Chapman, R. W. Hardesty, R. N. Reed filed. Acceptance of Service by counsel for each deft. thereon.

• • •

1961

May 27 Stipulation re proceedings filed by counsel of record.

June 14 Pltf.'s pretrial statement, narrative statement, witness list and statement of damages, filed.

June 22 Pretrial statement and list of witnesses of deft. Capital Airlines, Inc., filed.

June 23 Notice of taking depositions of witnesses C. E. Naill, F. A. Moore, George Lowery, William Care, M. Joy, John Wenner filed by U. S.

June 23 Narrative Statement and List of Witnesses filed by deft. USA.

July 28 Pretrial stipulation of counsel filed. (filed this number).

Aug. 2 Pretrial held before J. Gourley, Trial memo filed. (Rep. D. Harrington) filed this number.

Aug. 3 Order entered, dated Aug. 2, 1961, consolidating this case with CA 17541, (Gourley, J.) (filed this number).

Sept. 18 Memo Order entered directing that counsel file a complete record of the hearing before the U. S. District Court of Columbia in which the issue was adjudicated as to whether the pilot involved in said accident was engaged in a course of activity for which the U. S. of America is subject to liability; further ordered, that if counsel desires to present additional testimony, such testimony must be presented on or before Nov. 15, 1961, at 10:00 AM (Gourley, J.).

[fol. C]

Nov. 27 Trial opens before Gourley, J. and jury.

1961

Nov. 28 Trial continues.

Nov. 29 Trial continues. Capital Airlines dismissed without prejudice jury discharged and case continued Non-Jury. Trial memo filed. (Rep. D. Harrington).

Nov. 29 Stipulation filed and Order entered dismissing Capital Airlines, Inc., without prejudice and without costs. (Gourley, J.).

Nov. 29 Pursuant to Stipulation filed and Order entered, Capital Airlines, Inc., is hereby dismissed without prejudice and without costs.

JAMES H. WALLACE, JR., *Clerk.*

Nov. 29 Non-Jury trial opens before Gourley, J.

Nov. 30 Non-Jury trial continues.

Dec. 1 Non-Jury trial continues. (case continued to 12-7).

Dec. 7 Non-Jury trial continues and concludes. C.A.V. before Gourley, J.
Non-Jury trial memo filed. (Rep. E. Pock and James Riffle).

* * *

Dec. 20 Opinion and Conclusions of Law filed and Order entered directing that judgment be entered in favor of Nadine Y. Levin and against the United States of America in the amount of $245,000; judgment be entered in favor of Joy Ellen Levin and against the United States of America in the amount of $100,000; judgment be entered in favor of Mellon National Bank and Trust Company, Executor of the Est. of Jack Levin, dec'd and against the United States of America in the amount of $5,000 for conscious pain and suffering and in the amount of $1,000. as stipulated funeral expenses or a total of $6,000; judgment be entered in favor of Sydney L. Johns and

1961

against the United States of America in the amount of $70,000.00; and judgment be entered in favor of Kennedy Smith, Executor of the Estate of Ruth M. Johns, dec'd and against the United States of America in the amount of $5,000; for conscious pain and suffering and in the amount of $1,000 as stipulated funeral expenses, or a total of $6,000. (Gourley, J.).

[fol. D]

Dec. 21 Pursuant to Opinion and Conclusions of Law filed and Order entered, judgment is hereby entered as stated above.

JAMES H. WALLACE, JR., *Clerk.*

* * *

1962

* * *

Feb. 15 Notice of Appeal filed by the United States.

Feb. 19 Copies of Notice mailed U. S. Court of Appeals and counsel for pltfs. letters to U. S. Attorney and Judge Gourley.

Mar. 9 Motion filed, with consent thereon, and Order entered extending time to file record and docket appeal for 90 days from filing of the first notice of appeal. (Gourley, J.).

* * *

May 10 The Record on Appeal, except exhibits, forwarded this day to Ida O. Creskoff, Clerk, U. S. Court of Appeals for the Third Circuit; letters mailed to counsel and Court.

* * *

[fol. E]

CLERK'S NOTE

Transcript of proceedings in the United States District Court for the District of Columbia in Civil Action Nos. 1236-59, 1237-59, 1238-59—State of Maryland for the use of Mary Jane Meyer, State of Maryland for the use of Vance Lewman Brady, Capital Airlines, Inc., Plaintiffs, v. United States of America—filed pursuant to order of September 18, 1961, of the United States District Court for the Western District of Pennsylvania in Civil Action No. 17503—State of Maryland for the use of Nadine Y. Levin, etc., et al., Plaintiffs, v. United States of America—follows:

(Opening statements were made by Mr. Galiher and Mr. Pettibone.)

MR. GALIHER: Your Honor, I would like to start out now by calling a gentleman from the Bureau of Employees Compensation Commission, who has brought some records in response to a subpoena, and simply have them identified because I do not want to go into them at this point, and he may desire to leave at 12:30.

Mr. Skahan.

Thereupon,

Robert J. Skahan

called as a witness by the plaintiffs, being first duly sworn, was examined and testified as follows:

Direct Examination.

By MR. GALIHER:

Q. Mr. Skahan, what is your full name and would you please spell your last name? A. Robert J. Skahan, S-k-a-h-a-n.

Q. What is your address? A. Home address?

Q. Please. A. 2339 Holmes Run Drive, Falls Church, Virginia.

Q. What is your occupation? A. I am an attorney for the Department of Labor.

8 Q. And in what particular branch of the Department of Labor are you presently associated or affiliated? A. I am Chief of the Subrogation Branch, Office of the Solicitor.

Q. In response to a subpoena served upon your branch to bring with you certain records concerning a matter involving Captain Julius R. McCoy, have you responded to that subpoena and brought those records? A. Yes, I have.

Q. Would you hand them to me, if you please, at this time. A. (Handing records to counsel.)

Q. Now, I understand so that you might be able to take these back, you have prepared verbatim copies of what is contained in these records? A. Yes, I have.

Q. Do you have two of those? A. Yes, I do.

Q. I wonder if you would give those to me.

(Copies of records were handed to counsel.) You have three, can you give me one more? A. Yes.

Q. Fine.

MR. GALIHER: Would you like to examine these to make sure that they are accurate?

9 (Mr. Galiher conferred with Mr. Pettibone.)

MR. GALIHER: Will the Court indulge us while Mr. Pettibone takes a look at those?

THE COURT: Yes, certainly.

MR. GALIHER: Counsel has stipulated we may introduce, in lieu of the original records, the copies. I have enough copies for everyone, Your Honor, so that you may have one, Mr. Pettibone has his, and I have one.

MR. PETTIBONE: We did not stipulate to the introduction of this file or the contents of it.

MR. GALIHER: I haven't offered it. I simply at this time want to relieve this gentleman of the necessity of coming back, and secondly, having to leave his original records when we have copies.

THE COURT: Well, the statement that you made was to indicate that the stipulation was that this copy was a true copy of what is in the file, is that it?

MR. GALIHER: That is all I am asking.

MR. PETTIBONE: That is satisfactory to the defendant.

THE COURT: Very well.

By MR. GALIHER:

Q. There is one thing here I wish you would read into the testimony, which didn't come out too well on your photostat machine.

MR. GALIHER: I have no ulterior motive, it is the
10 only way I know to get it in the record because I can't read it. I w .l show you what it is.

(Mr. Galiher conferred with Mr. Pettibone.)

By MR. GALIHER:

Q. Would you please read the statement into the record which seems to start, "Make no payment." Can you read that? A. (Reading:) "Make no payment for time being. See Department of Justice letter of 2-27-59."

Q. Thank you.

THE COURT: See letter of what date?

THE WITNESS: 2-27-59.

By MR. GALIHER:

Q. Now, are those records which you have brought here, an exact copy of which has been identified and stipulated on, records of the Department of Labor made in the ordinary course of its business and as prescribed by the regulations of the Department of Labor? A. Yes, they are.

MR. GALIHER: I have no other questions of this witness, Your Honor.

Cross-Examination

By MR. PETTIBONE:

Q. Mr. Skahan, does this file that you have produced contain records or statements or documents prepared by anyone other than you or members or employees of your
11 office? A. Yes, it does.

Q. Will you please take the file and let us start at the beginning and go through it. I would like you to identify each record or document which was prepared or made by you or a member or employee of your office in the Department of Labor. I want you to identify just merely those which were made by those persons. Now, describe each document so that they can be identified so the reporter can take it down.

THE COURT: Are you going to try to identify that by subject matter, or by a marking of some kind?

MR. PETTIBONE: Well, I think there is such a collection of documents, it is apt to be by a brief description and date perhaps, sometimes insofar as the subject matters are form numbers, we can use that to simplify it, but some other matters may just have to be described because there is no distinctive mark.

By MR. PETTIBONE:

Q. Will you proceed? A. The first document prepared in my office is a slip dated January 11, 1960, and it has my initials, R. J. S., just above the date.

The second is a sheet of yellow paper, handwritten, signed F. F. Nolte, dated January 8, 1960.

The next is a sheet of yellow paper, handwritten, the file number and the name McCoy in the upper righthand
12 corner, my initials, R. J. S., at the bottom, with the date August 25, 1959.

The next is a slip of white note paper, handwritten, there is a handwritten note in the upper portion which I cannot identify as to authorship, and below that in my own handwriting is an additional note, my initials, R. J. S., dated August 25, 1959.

Next is a letter dated December 9, 1958, addressed to Mr. Lester S. Jayson, with the Department of Justice, signed by William B. Wright.

Next is a letter dated November 4, 1958, also addressed to Mr. Jayson, signed by Mr. William B. Wright.

There is a form here which is used in our office but it was not prepared by us, Form G-4, signed Julius R. McCoy, dated October 3, 1958.

Next is a letter dated August 28, 1958, addressed to Julius R. McCoy, 6C Alder Drive, Baltimore, Maryland, signed William B. Wright.

MR. STEIN: What was the date of that?

THE WITNESS: August 28, 1958.

Next is a letter dated July 14, 1958, addressed to Julius R McCoy——

MR. STEIN: What was that letter, what was the last document you just identified?

THE WITNESS: The letter dated July 14, 1958?

13 MR. STEIN: We don't seem to be able to find it here, that is why I interrupted.

MR. PETTIBONE: Does this copy which you brought in, and which was prepared, follow the same chronological sequence as the file? We are unable to follow this from our copy, they seem to be in different sequence here.

THE WITNESS: They are supposed to be in the same sequence.

MR. PETTIBONE: We don't find them. Which one are you referring to?

THE WITNESS: July 14, 1958, letter to Mr. McCoy, signed by Mr. Wright.

MR. DAVIDSON: It is in there, but it is further down.

MR. STEIN: Here it is. We have it now, Mr. Skahan.

MR. PETTIBONE: You may proceed.

THE WITNESS: Next is a letter dated——

MR. STEIN: Describe that again, I don't know if you finished, July 14, 1958, from Mr. Wright?

THE WITNESS: To Mr. McCoy.

MR. STEIN: I see, okay.

THE WITNESS: Next is a letter dated June 6, 1958, addressed to Julius R. McCoy——

MR. STEIN: Just hold up here, you hopped over a few.

THE WITNESS: —signed by Mr. Wright. Those are the only documents in this file.

14 MR. STEIN: Those are the only documents in this file prepared by the Solicitor's office?

THE COURT: You mean prepared by the Solicitor's office of your office?

THE WITNESS: I am in the Solicitor's office.

By MR. PETTIBONE:

Q. Does your file contain Form C.A.1, the form which is —well, first of all, does it contain a Form C.A.1?

THE COURT: Is that C.A.1?

MR. PETTIBONE: C.A.1, Your Honor.

THE WITNESS: Yes, it does.

By MR. PETTIBONE:

Q. What is the general nature or purpose of such a Form C.A.1? A. Form C.A.1 is Employee's Notice of Injury or Occupational Disease.

Q. Does your file contain a Form C.A.2? A. Yes, it does.

Q. What is the nature or purpose of that Form C.A.2? A. Form C.A.2 is the Official Superior's Report of Injury.

Q. Does your file contain a Form C.A.16? A. Yes, it does.

Q. What is the nature or purpose of Form 16? A. Form C.A.16 is a Request for Treatment of Injury under the United States Employees' Compensation Act.

Q. Does your file contain any other C.A. Forms, other than those which I have just named? A. Yes, it does.

Q. What are the C.A. numbers? A. There is a Form C.A. 20, which is an Attending Physician's Report. There is also a C.A.25, which is a Summary Sheet.

Q. Will you please point out the Summary Sheet to me that you just referred to? A. (Handing form to counsel.)

Q. Does this Summary Sheet indicate what action was taken by your office in regard to the claim which was filed? A. With regard to my office, yes.

Q. And in what paragraph number or what part of that Summary Sheet is that to be found? Just designate the part, if you can, so it can be identified. A. On the face of the sheet, in the lower lefthand portion, there is a block which is headed "Third Party Action," there is a stamp, a date, and some initials.

Q. What are the initials that you refer to? A. They are the initials of Mr. William B. Wright.

Q. Are there are other initials on this sheet? A. Yes, there are.

Q. What initials are they and where are they to be
16 found? A. They are more or less in the center section of the face of the sheet under, "Examiner's Findings."

Q. What initials appear there? A. Under number one, there are the initials J.S.

Q. Who is J.S., if you know? A. J.S. is John Stasko.

Q. Who is John Stasko? A. He at that time was an examiner, claims examiner for the Bureau of Employees Compensation, United States Department of Labor.

Q. Is he still employed by the Department of Labor? A. Yes, he is.

Q. By your Bureau? A. By the Bureau of Employees Compensation.

Q. All right. Are there any other initials on there? A. Yes, the initials J.M.D. also appear.

Q. Do you know whose initials they are? A. They are the initials of John M. Diggins.

Q. Who was Mr. Diggins? A. At that time, Mr. Diggins was also a claims examiner, a trainee, I believe.

Q. Was he employed by the Bureau of Employees Compensation? A. Bureau of Employees Compensation, Department of Labor.

17 MR. PETTIBONE: I have no further questions.

Redirect Examination

By MR. GALIHER:

Q. Who is Mr. Stuart Rothman, referred to in that file? A. At that time, Mr. Rothman was Solicitor of Labor.

Q. And what was Mr. Wright's position at that time? A. Mr. Wright at that time was Chief of the Subrogation Branch, Office of the Solicitor.

Q. Was the claim involving Captain Julius R. McCoy handled and processed just the way all claims were proc-

essed and handled involving employees of the United States Government injured in line of duty? A. Yes, it was.

Q. And is it necessary and was it, in this case, to correspond with the particular department or branch of the Service that Captain McCoy was associated with or employed by, in order to handle and process this particular compensation claim? A. There was some correspondence between the Bureau of Employees Compensation of the Department of Labor and the United States Property and Fiscal Officer for the State of Maryland.

Q. And that was handled in accordance with the usual manner of handling such a claim? A. Yes, it was.

18 Q. Now, did the Department of Justice have any connection with the United States Property and Fiscal Officer for the State of Maryland, so far as the file would indicate? A. I am not sure what you mean by "connection."

Q. Well, does the Department of Justice ordinarily interest itself in a compensation claim involving the employee of another bureau or agency?

MR. PETTIBONE: I am going to object to that question, no foundation has been laid yet to show that this witness has any familiarity with the practices of the Department of Justice; no qualification to answer a question of this kind has yet been shown.

MR. GALIHER: He certainly, from his employment, will know whether another agency ordinarily interferes or interests itself in a claim brought on behalf of the employee of an agency other than the Department of Justice.

MR. PETTIBONE: I object to the use of the term "interfere." There has been no testimony there was any interference here and that carries an implication that is not disclosed by any evidence yet.

THE COURT: I understood your question to this witness to be did the Department of Justice have a connection with this Fiscal Officer in Maryland.

MR. GALIHER: Yes.

THE COURT: Well, now, he is employed by the De-
19 partment of Labor.

MR. GALIHER: Yes. Well, he didn't understand my question and I then abandoned it and asked him the specific question, does the United States Department of Justice ordinarily interest itself in a compensation claim brought by an employee of some other United States department or bureau, that is the only pending question at this time, Your Honor.

THE COURT: Well, he would only know about his office, I would think.

MR. GALIHER: My question is solely as far as the compensation claim in his office is concerned.

MR. PETTIBONE: My objection is to the fact that the witness is an employee of the Department of Labor. The question relates to the policies and practices of the Department of Justice. There is no evidence to show that he is qualified to answer questions concerning the Department of Justice or knows anything about it.

THE COURT: I thought you said that question had been abandoned?

MR. GALIHER: The sole question is, as far as his office was concerned, Judge Matthews, did the Department of Justice ordinarily interest itself in claims for compensation brought by employees of other departments or agencies who were injured and made claims for compensation to his department?

MR. PETTIBONE: There is no showing yet that he
20 has knowledge as to whether or not the Department of Justice interests itself in such claims and no evidence to show that he has any way of knowing what the practice or policy of the Department is, in that connection.

MR. GALIHER: We aren't talking about the policy of the Department of Justice. We are talking about it as manifested in his department in this and in other claims, and certainly from his employment there, he would know if that had been done in other cases or was ordinarily done.

THE COURT: In his office?

MR. GALIHER: Yes, ma'am, that is all.

THE COURT: Well, I think he may answer that, if he knows.

THE WITNESS: Within my knowledge, the Department of Justice does not ordinarily interest itself in compensation claims.

MR. GALIHER: Thank you, sir. That is all.

THE COURT: Have you finished now with this witness?

MR. GALIHER: Yes, ma'am.

THE COURT: Have you finished?

MR. PETTIBONE: Yes, Your Honor.

MR. GALIHER: May Mr. Skahan be excused?

THE COURT: I take it no one has any objection to Mr. Skahan being excused and taking with him his original records, is that correct?

21 MR. PETTIBONE: No objectoin on my part, Your Honor.

MR. GALIHER: Yes, ma'am.

THE COURT: You are excused and you may take your records.

MR. GALIHER: Thank you very much, Mr. Skahan.

(Witness excused.)

THE COURT: We are going to recess now for lunch. I have an engagement that will take a little more time than usual, so the recess will be until 2:15 and we will sit from 2:15 to 4:15.

(Whereupon, at 12:45 p.m., the Court adjourned until until 2:15 p.m.)

22 Afternoon Session

(The proceedings resumed at 2:25 p.m.)

THE COURT: Mr. Galiher.

MR. GALIHER: Thank you, Your Honor. Your Honor, next I would like to introduce into evidence, show to you,

rather, certain interrogatories and answers thereto, which were propounded to the Defendant United States of America and which are in all three of the files on Your Honor's desk. I would, first of all, like to read into evidence interrogatory No. 1. Now, these were propounded by the plaintiff to the Defendant United States:

"Did the United States of America on May 20, 1958, own a T-33A-5 jet airplane bearing serial number NC 53-5966?"

The defendant answers that:

"Yes, except the serial number of the T-33A-5 jet airplane was NG 53-5966."

Would Your Honor like me to wait?

THE COURT: What is that in, this file?

MR. GALIHER: It is in all of those files, I think one was filed in each one. The one I happen to be looking at, at this time, happens to be the Brady file.

THE COURT: I have the questions now.

Now I have the answers. You may go ahead.

MR. GALIHER: Yes, ma'am. Number 2(c):

23 "For what Government Branch was said Airplane purchased by the United States of America?"

And the answer:

"It was not purchased for any 'Government Branch' of the United States as it was allocated to the Maryland Air National Guard and delivered by the manufacturer directly to the State of Maryland Air National Guard."

Number 2(d):

"Was the said airplane assigned or in some manner transferred or turned over to the Maryland Air Na-

tional Guard, and if so, when and by whom, and by what document or means? Attach a true and correct copy of the document to your answers to these interrogatories."

The answer:

"Yes; Headquarters, Air Materiel Command directed Lockheed Aircraft Corporation to release said aircraft to the 104th Fighter Bomber Squadron, Air National Guard, Harbor Field, Baltimore, Maryland, with delivery to Friendship Airport, Baltimore, Maryland. This was accomplished on or about September 26, 1955, by TWX, a copy of which is attached hereto and marked 'Exhibit 1'."

Next, question No. 5:

24 "By the authority and direction of what Government unit or department was the said airplane turned over to the Maryland Air National Guard?"

And the answer:

"Air Materiel Command, United States Air Force."

And then way over to question 86, may it please the Court:

"Who paid for the fuel used in connection with the operation of the said T-33 jet airplane at the time of this flight and at the time of prior flights within 5 years made by officers of the United States Air Force Reserve associated with the Maryland Air National Guard?"

And the answer:

"The fuel consumed by the T-33 flight in question was provided by the United States Government. The

balance of the question is meaningless, as there are no officers of the United States Air Force Reserve associated with the Maryland Air National Guard."

And finally No. 90, Your Honor:

"Who paid for the upkeep, maintenance and repair of the said T-33 jet airplane, Serial Number 53-5966 on and within 5 years prior to May 20, 1958? If paid by the State of Maryland, was the State reimbursed by the Federal Government, by any subsidy or otherwise?"

And the answer:

"From on or about September 26, 1955, the date of delivery of the aircraft by the manufacturer, the United States Government paid for the upkeep, maintenance and repair of the T-33, Serial No. NG 53-5966, until May 20, 1958."

May 20, 1958, was the date of the collision and it was not subject to repair, it was just completely demolished in the accident.

We have agreed, Your Honor, in the interest of saving you as much time as possible, to use, in lieu of the oral testimony of certain witnesses, their depositions, with the exception of Captain McCoy and Col. Kilkowski, who will testify. These depositions are before Your Honor and I would like to refer Your Honor, first, to the deposition of General Wilson.

Now, with respect to General Wilson, Your Honor, you will also find in your file a supplemental pre-trial statement which contains a review of the pertinent testimony of these witnesses whose depositions are before Your Honor, and with Your Honor's permission, I would like to refer you to page 5 of the plaintiff's supplemental pre-trial statement. Now, what I would like to do, again in the interest of

saving time, instead of reading all this testimony, I have condensed and made page references to all testimony
26 which, in our opinion, is significant, as Your Honor will see. I would like to go along and refer to that and if Your Honor would like to stop me at any given point, we can actually refer to the testimony of the witness and look at the questions and answers, if there is anything here Your Honor would like further clarification on.

THE COURT: Very well.

MR. GALIHER: The authority for the creation of the Air National Guard Bureau, as I have indicated, is found in the testimony of General Winston P. Wilson, Deputy Chief of the National Guard Bureau and Assistant Chief for the National Guard Bureau for the Air National Guard. As he pointed out, the National Guard came into existence under the quoted article of the Constitution:

> "The Congress shall have power • • • To provide for organizing, arming and disciplining, the Militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the officers and the authority of training the Militia according to the discipline prescribed by Congress."

The Guard has two statuses, both a State and a Federal status. If a State says it will accept the unit, then the authority to organize under the regulations pre-
27 scribed by the Air Force as to what a unit has to have to maintain, to get a Federal organization.

MR. PETTIBONE: Excuse me, if the Court please. I am sorry to interrupt, but it seems to me this procedure is quite irregular. It strikes me that counsel for the plaintiff is, in essence, summarizing the testimony of a witness. As he stated, we have stipulated and agreed that the deposition which was previously taken of this witness, Major General Wilson, would be admitted in evidence in this pro-

ceeding. Apparently, the counsel for plaintiff is now reading from a pre-trial statement which has been filed and is before the Court and which, in what the defendant considers to be an argumentative way, attempts to summarize that testimony in that deposition. It would seem to the defendant that not only is the procedure irregular, but this is not the proper place for such an argument. It is also in violation of the best evidence rule, because with the deposition before the Court, the questions and answers contained therein should speak for themselves.

THE COURT: Very well. Since there is no objection, you may summarize the evidence at the end of your case, that is, in your argument.

MR. GALIHER: Your Honor, I think there is necessary testimony in General Wilson's deposition which Your Honor should have at the outset of the case, before you re-
28 ceive the oral testimony, and I am simply doing it in chronological order.

Now, I have given Mr. Pettibone a copy of what is on file here and what I am attempting to do is to summarize it, and if there is anything that I say which is not correct, he will have an opportunity to check that. Otherwise, the only way I can get this testimony before Your Honor is to have it read back and forth in question and answer form, and it seems to me that we are just taking up unnecessary time when I do that. He has every comment that I will make, he has every page reference and if he doesn't agree with it, he can point out in the testimony where it is in conflict. I am simply trying to save the Court's time, that is all.

This man is at the top, he is Deputy Chief of the National Guard Bureau and that is where we should start, to give Your Honor the picture. As I say, everything that I am going to bring to Your Honor's attention, as an officer of the Court, I state is in that deposition and I also have the page references. I could not bring it to Your Honor's attention other than by digesting it, as I have, short of reading questions and answers. Now, if counsel insists on doing

that, we can do that, but it seems to me that that will prolong this unnecessarily.

THE COURT: Well, your summary is here in the file.

MR. GALIHER: Yes.

29 THE COURT: And available for me to read, as well as this deposition.

MR. GALIHER: Well, might I ask Your Honor to do this, might we pause so Your Honor might read it, so that we might go forward in chronological order.

THE COURT: You mean read the deposition?

MR. GALIHER: No, read the digest.

THE COURT: Well, that is exactly what the objection has been made to, presenting it in that way. But when the case is finally submitted, I have everything that is in the file, as well as this deposition.

MR. GALIHER: Well, may I ask Mr. Pettibone how he would like me to proceed with the testimony of General Wilson? Perhaps I can overcome any objection that he might have.

THE COURT: Well, you may confer with him, if you wish.

(Mr. Galiher conferred with Mr. Pettibone.)

MR. PETTIBONE: I see no alternative but to read the deposition, questions and answers.

MR. GALIHER: Your Honor, I would then ask Your Honor to suspend the hearing at this time so that Your Honor may, yourself, read the deposition of General Wilson and then we can go on. I think it extremely important for your benefit, as well as for our case, that Your Honor get the picture in a chronological sequence.

THE COURT: Well, what deposition will follow the

30 deposition of General Wilson?

MR. GALIHER: The oral testimony of Captain McCoy will follow this deposition. But, as I say, I am going to have to read it into evidence at this time or ask Your

Honor to read it, because I think it is extremely important from Your Honor's standpoint that it be done that way.

THE COURT: All right, just be seated and I will read it.

(At 2:45 p.m., the proceedings were suspended for the Court to read the deposition of General Wilson.)

THE COURT: If you gentlemen desire a recess, you may have one of ten minutes.

(At 3:15 p.m., the proceedings resumed.)

THE COURT: You may proceed, Mr. Galiher.

MR. GALIHER: Thank you, Your Honor. Specifically, Your Honor, for the sake of the record, I would like to call to Your Honor's attention at this time the parts of General Wilson's testimony which are contained in my supplemental pre-trial statement.

Next, Your Honor, I would like to introduce into evidence at this time Air National Guard Manual 40-01. This has been the subject of a stipulation entered into by counsel, as is referred to in the pre-trial order, and there are certain significant parts of this Manual that I think would
31 interest Your Honor at this time.

It will be interesting, I think, to Your Honor to note that in one of the cases which I gave to you this morning, the case of Holly v. United States, Air National Guard Regulation 75-16 was referred to.

I believe this Manual that I am now about to refer to superseded and took the place of 75-16.

THE COURT: Are you offering that Manual as a whole or just certain parts?

MR. GALIHER: Certain parts and, of course, if Mr. Pettibone has certain other parts to bring to your attention, certainly he may do so. May I call at this time to Your Honor's attention the pertinent parts that I have in mind?

THE COURT: Yes.

MR. GALIHER: Your Honor will see on the front cover of this Manual, "Air National Guard Manual ANGM 40-01, Civilian Personnel Manual," then the seal of the Department of the Army and the Air Force, as well as National Guard Bureau. It is dated March 1, 1958, and then down at the bottom, "Department of the Air Force, National Guard Bureau."

Next, drawing Your Honor's attention to the Foreword, again in the lefthand corner, "ANG Manual 40-01," "Department of the Air Force, Washington, 1 March 1958."

"Foreword . . . Provisions"—and again I am only taking from context: "Provisions of this Manual will govern all Air National Guard civilian employees, including those employed on a temporary hourly rate basis except those hired wholly from State or Service contract funds, and will become effective as of 1 April 1958."

"By Order of the Secretary of the Air Force: Edgar C. Erickson, Major General, Chief, National Guard Bureau."

And again at page 1, under Section 1, No. 3, Delegation of Authority:

"The authority of the National Guard Bureau to regulate the employment and rates of compensation is contained in Department of the Army General Order 96, dated 9 November 1951, subject, 'Delegation of Authority for the Employment and Fixing of Salaries for all Caretakers and Clerks in the National Guard Bureau'."

And again on page 2, under the heading "b. National Guard Maintenance Type Positions (NGM):"

"This type of category is characterized by trade, craft, maintenance, and labor type positions. These positions are similar to United States Civil Service Wage Board positions and pay rates are adjusted by periodic surveys conducted by the Army-Air Force Wage Board. The following pay rates are included in this category classification:

"(1) National Guard Maintenance (NGM). Technically skilled positions primarily concerned with the accomplishment of specific tasks and duties related to crafts,
33 trades, maintenance of equipment and physical labor. The employees in these positions accomplish tasks and duties as directed by supervisory personnel."

Your Honor, there are other provisions in here containing job descriptions which will become significant, which I will refer to when the particular witness is on the witness stand.

I would like to call at this time Captain Julius R. McCoy.

THE CLERK: Plaintiff's Exhibit No. 3 marked for identification.

(Civilian Personnel Manual ANGM 40-01 was marked Plaintiff's Exhibit No. 3 for identification, and the designated parts were received in evidence.)

Thereupon,

Captain Julius R. McCoy

called as a witness by the plaintiff, being first duly sworn, was examined and testified as follows:

MR. GALIHER: May it please the Court, I would like to call Captain Julius M. McCoy as a witness under the provisions of Rule 43(b) of the Federal Rules of Civil Procedure. I think that Mr. Pettibone will stipulate that there is companion litigation pending in the Federal Court in Baltimore, Maryland, in which both the United States of America and this gentleman are defendants. Because
34 of the limitations of the service of original process in our Court, being confined to the territorial limits of the District of Columbia, Captain McCoy could not be served in the District of Columbia, but I think he certainly comes under the requirement of 43(b).

Direct Examination

By Mr. Galiher:

Q. What is your name, please, sir? A. Julius R. McCoy.

Mr. Pettibone: If the Court please, could we pause one moment? I don't know that the defendant can consent.

The Court: I can't hear you.

Mr. Pettibone: The defendant cannot consent to the plaintiff's reference to Rule 43(b) as a basis upon which the witness has been called. Rule 43(b) provides that a party may interrogate any unwilling or hostile witness by leading questions, with other provisions pertaining thereto.

The defendant has no information or knowledge which would indicate that this witness is hostile or unwilling as far as either the plaintiff or this defendant is concerned. He is certainly not the witness of the defendant.

Mr. Galiher: I am not contending that, it is the next sentence, Your Honor, which I think applies to the situation.

The Court: "A party may call an adverse party or an officer, director," is that what you have reference to?

35 Mr. Galiher: Yes, ma'am.

The Court: Well, this witness is not being sued here but you say is being sued in Maryland and you haven't sued him here because you can't get process, is that it?

Mr. Galiher: Yes, ma'am. The same units are pending in the Federal Court in Maryland, the same language as these three actions, but in that case both the United States and Captain McCoy are defendants. Here, because of the unavailability of serving him, he is not a defendant.

The Court: Well, these people that are suing in Maryland, are not the same people that are suing here, are they?

Mr. Galiher: Yes, ma'am, they are the identical people, the same identical cases.

Mr. Pettibone: The defendant objects because the witness is not an adverse party in this proceeding. I can't understand how the plaintiff could, therefore, treat him as

an adverse party when in fact he is not an adverse party in this proceeding.

THE COURT: I will rule that 43(b) applies.

By MR. GALIHER:

Q. What is your address, Captain McCoy? A. 4K Alder Drive, Baltimore 20, Maryland.

Q. What is your occupation at the present time. A. I am employed by the Maryland Air National Guard as an aircraft maintenance chief.

36 Q. How long have you been so employed? A. Since May 16 of 1958.

Q. Prior to that time, what was your job and position and status? A. I was employed by the Maryland Air National Guard as a base maintenance supervisor.

Q. When did you first become affiliated with the Maryland Air National Guard? A. In January of 1952.

Q. And in what connection? A. I was assigned as a fighter pilot.

Q. Who made that assignment? A. Final approval, I believe, was by the National Guard Bureau.

Q. Is that the National Guard Bureau of the United States? A. I believe so, yes.

Q. Can yau tell the Court what steps were taken in order to bring that about? A. I made application for admittance to the 104th Fighter Squadron located in Baltimore and met an Officer Procurement Board and completed the necessary papers for a commission with the Maryland Air National Guard.

Q. When did you officially start to work? A. In early June of 1956, June 8, I believe is the starting date.

37 Q. And your title at that time was aircraft maintenance chief? A. At that time, it was base maintenance supervisor.

Q. What were the duties of a base maintenance supervisor? A. To supervise the maintenance and care of aircraft,

vehicles, ground support equipment, and the overall supervision of the people that maintain this equipment.

Q. And what did the equipment consist of? A. Various types of aircraft and vehicles and related support equipment.

Q. Do you know who owned the aircraft involved? A. The United States Government.

Q. What about the vehicles? A. The United States Government.

Q. Did you receive a certain grade or job classification at that time? A. Yes; I don't recall exactly what it was at that time.

Q. Now, will you state whether or not at that time you had any military status? A. This is in June of 1956?

Q. Yes, sir. A. I was a first lieutenant in the 104th Fighter Squadron of the Maryland Air National Guard and as aircraft maintenance officer for the squadron.

Q. How had you received that commission, what
38 steps had been taken? A. The commission was continuous from my entrance into the Air National Guard; however, I had been promoted to a higher grade.

Q. What were your duties in the military status that you have just referred to? A. Supervision of maintenance personnel, training in the maintenance area, and the supervision of care of the equipment such as aircraft, ground support equipment.

Q. Can you tell us about your work schedule in the two jobs during the course of the average week, what were your requirements? A. As a base maintenance supervisor, I was employed as an air technician and the normal work week would be from eight in the morning until 4:30 in the evening, except approximately two Saturdays—this is Tuesday through Saturday—and approximately two Saturdays a month, I would be in a military status as a captain in the Air National Guard and as squadron maintenance officer.

Q. I neglected to ask you, Captain, are you here in response to a subpoena served upon you? A. Yes, sir.

Q. May I ask you whether or not as acting maintenance supervisor, the job description of that job is as contained in the Air National Guard Manual (showing manual
39 to the witness)? A. Would you state the entire question?

Q. You have testified that you were acting maintenance supervisor in the month of May 1958. I am asking you if the job description for that particular job is as is contained in the Air National Guard Manual captioned "Civilian Personnel Manual"? A. Are you referring or inferring that I testified to that in this courtroom?

Q. No, I am asking you if what I have now shown you constitutes a job description of the job you refer to as a maintenance supervisor or acting maintenance supervisor?

MR. STEIN: May I ask what you are showing him?

MR. GALIHER: 40-01, Air National Guard Manual, the part which refers to the language "Maintenance Supervisor," page 105.

MR. STEIN: Thank you, that makes it easy to find. Dated when?

MR. GALIHER: This is the month of May 1958, that I am asking him about. The Manual that I have is the one before you, which I believe is dated 1 March 1958, and which covers the time of the accident, May 20, 1958.

THE WITNESS: I am still not quite clear, Mr. Galiher, I have not testified in this Court I was an acting maintenance supervisor.

40 By MR. GALIHER:

Q. Well, you have testified up to this point that you were an aircraft maintenance chief? A. That is correct.

Q. Would you look at page 107 and tell us if that is the job description for the job which you held as aircraft maintenance chief? A. That is correct.

Q. And on what date did you hold this position, Captain? A. Aircraft maintenance chief?

Q. Yes, sir. A. From the 16th of May, 1958, to the present.

MR. GALIHER: May I, instead of reading the two pages, Your Honor, refer them to you at this time, if you please?

THE COURT: This covers under V, 1, 2, and 3, is that it?

MR. GALIHER: I have reference, Your Honor, to that entire page, it has the complete job description.

(The Court read as requested by counsel.)

By MR. GALIHER:

Q. Now, prior to May 16, 1958, were you an acting maintenance supervisor at the base? A. I was the base maintenance supervisor.

Q. And was your title acting maintenance supervisor at that time? A. No, sir; it was base maintenance supervisor.

Q. Base maintenance supervisor. Does this job description commencing on page 105, of the same Manual, refer to your duties as base maintenance supervisor before May 16, 1958? A. It does.

MR. GALIHER: Your Honor, might I likewise show you the job description for this?

THE COURT: Yes.

(The Manual was handed to the Court to read.)

By MR. GALIHER:

Q. Prior to becoming maintenance supervisor, what job description did you have at the base? A. Prior to becoming maintenance supervisor?

Q. Yes, sir. A. I was not employed at that base prior to becoming maintenance supervisor.

Q. As base maintenance supervisor, how many persons did you have under your control and supervision? A. Approximately 75 to 80 people.

Q. What were their duties, Captain? A. Maintaining aircraft, vehicles and other related equipment.

Q. The same vehicles and aircraft of the United States of America? A. They were owned by the United States of America.

42 Q. You mentioned a commission that you held. Did you also at that time hold a Reserve commission in the Air National Guard of the United States? A. I have held a commission in the Air National Guard since January of 1952.

Q. Since January 1952? A. That is correct.

Q. And did in the month of May 1958. Now, drawing your attention to the air technician job that you mentioned, by whom are you paid? A. My check was made on the Treasury of the United States.

Q. And what was the amount of your check in the month of May 1958, in the capacity as maintenance supervisor? A. I don't recall, Mr. Galiher.

Q. May I refresh your recollection by your deposition, page 11, in which you said it was $7,500 per annum; does that refresh your recollection? A. That is $7,500 per annum.

Q. Now, did you also receive a salary because of your military status? A. Yes, I received a prorated salary or compensation for certain military duties.

Q. And what was that salary and what were your duties? A. The salary was approximately $2,000 a year, and

43 it had dual duties in that I was an aircraft maintenance officer for the squadron in the military and I also got paid for flying.

Q. When did you generally get your hours for flying? A. This could be any day of the week or weekend or evening.

Q. After May 16, 1958, and including May 20, 1958, what was your job status in the civilian capacity? A. I was an air technician, aircraft maintenance chief.

Q. And was that your status on the day of the accident? A. That is correct.

Q. Now, in your capacity as air technician, from whom did you take your orders? A. Col. Kilkowski.

Q. And what was his title? A. He was the Base Detachment Commander.

Q. From whom did you take orders while in the military status? A. From the squadron commander—could I have my memory refreshed?

Q. Would that be Major Scott, as your deposition set forth? A. Major Scott.

Q. Now, tell us about the uniform that you were wearing in May of 1958 and if it is like the one that you have
44 on at present? A. It would be this or another form of this uniform.

Q. Is that uniform in any way different from the uniform of the United States Air Force? A. I don't think so, no.

Q. I believe you mentioned but may I ask you again, were both of these salary checks that you received, drawn on the Treasury of the United States? A. Yes, sir, they were.

Q. Did you have occasion to participate in summer training duty? A. Yes, sir.

Q. And where was your summer training duty, let us say, in the three or four years with respect to the bases that you were at? A. Prior to 1958?

Q. Yes, sir. A. 1957 was Savannah, Georgia, Travis Field.

Q. Is that a United States Air Force Base? A. Not to my knowledge, it is a City-owned field, Municipally-owned field. And 1956 was the same field, Savannah. 1955 was in Savannah, the same field. 1954 was Otis Air Force Base in Massachusetts.

Q. Was that a United States Air Force Base? A. Yes, it was.

45 Q. Did you also have occasion to take summer training or some training at Chanute Air Force Base, the United States Air Force installation? A. I attended the Maintenance Officers School, Maintenance Officer course at Chanute Air Force Base September 1955 until June of 1956.

Q. Now, on the occasion of the summer training programs, can you tell us what training program was pursued; in other words, who prepared the type of training program? A. The numbered Air Force that the 104th would be assigned to, in the event of mobilization, provided a training requirement.

Q. Do I understand, then, that the major Air Force Command would provide the training requirements, the major United States Air Force Command? A. Some Air Force Command would provide the training requirements.

Q. When you were at Chanute Field, were you paid through the United States Air Force Finance Office? A. Yes.

Q. Do you know who distributed the vehicles and aircraft to be maintained, to your base? A. It is my understanding that the National Guard Bureau distributed or assigned the particular vehicles and aircraft that were provided by the Air Materiel Command.

46 Q. Is the location of the National Guard Bureau at the Pentagon? A. It is.

Q. Were you required to submit monthly reports with respect to this equipment, to the National Guard Bureau and to the Air Materiel Command? A. Yes, sir.

Q. Tell us what they consisted of. A. One report in particular would be Air Force Form 110, which would be utilization and status on the various aircraft at our base.

Q. Was one report required to be sent to McClellan Air Force Base, a subdivision of the United States Air Force? A. Yes.

Q. What report was required to be sent there? A. The 110 report I just mentioned.

Q. Were other monthly maintenance reports required to be sent to Tinker Air Force Base at Oklahoma City? A. Yes, sir.

Q. What did that consist of? A. That would be an engine report, the number escapes me at the present, and if I am

not mistaken, it was the same 110, a duplicate 110 would be sent to Tinker.

Q. What was the 104th Fighter Squadron in the
47 month of May 1958? A. I beg your pardon?

Q. What was the 104th Fighter Squadron in the month of May 1958? Would you explain what it consisted of? A. You mean in numbers of people?

Q. The setup and operation, if you please? A. We were equipped with, I believe at that time, 25 F86H type aircraft and two T-33 type aircraft and one C-47 type. We had approximately 500 persons, various ranks, skills, et cetera, to combine into a fighter squadron. We had certain training requirements to maintain a state of readiness as a fighter squadron.

Q. What do you mean by that? A. As required by the gaining Command or some numbered Air Force that we might be assigned to for mobilization.

Q. Where was the Headquarters of the 104th Squadron? A. It was located at the Martin Airport in Baltimore, Maryland.

Q. And did the planes that you have spoken of, did they belong to the United States Government? A. They did.

Q. Will you tell us if there was an Air Adviser for the United States Air Force attached to your squadron? A. There was.

Q. What were his duties, as you understood them? A.
His one duty would be liaison between the Air Force
48 or the numbered Air Force and the unit itself, and to work with other Air Advisers in assisting in standardization among the various units, like-type units.

Q. What do you mean by standardization? A. To assist in assuring that like squadrons would be accomplishing the training in a standard manner.

Q. To see that various units were to operate in the same way, would that be one of the reasons? A. Well, not to govern them, but to assist in the standardization within our own squadron.

Q. To make sure that your squadron conducted itself in the way another National Guard unit conducted itself, in accordance with the wishes of the Guard Bureau, would that be one of the things the Air Adviser was to do? A. At least to assist.

Q. Was he also to see that you satisfied the criteria established by the Air Force? A. He is required to make certain reports, I am sure, and to make certain inspections on the quality of maintenance, for instance, of the vehicles and equipment.

Q. Will you tell us whether or not your squadron also had a Senior Air Supervisor attached to the 113th Fighter Wing at Andrews Air Force Base? A. Senior Air Adviser?

Q. Senior Air Adviser, excuse me; and was that
49 the United States Air Force Base at Andrews Field? A. That is correct.

Q. What was his connection with your squadron? A. The various squadrons within the Wing, our Wing, each had an Air Adviser attached and the Senior Air Adviser would have Command jurisdiction over the Advisers of each squadron.

Q. And he was the Senior who gave instructions to your Air Adviser? A. That is correct.

Q. Now, what was your status in the month of May 1958, as a pilot, Captain McCoy? A. As a member of the 104th Fighter Squadron, I was a rated flying officer.

Q. Did you have any standards, efficiency standards or otherwise, to maintain at that time? A. Air Force Regulation 60-2 prescribed certain minimums that must be attained by all pilots to maintain standards as laid down by that regulation.

Q. Is this what you have reference to (indicating)? A. That is correct.

MR. GALIHER: At this time, may I introduce this as the next numbered exhibit, this is the Air Force Regulation which Captain McCoy has just referred to, or I should say a photostatic copy.

50 THE CLERK: Plaintiff's Exhibit 4 for identification.

(Air Force Regulation 60-2 was marked Plaintiff's Exhibit No. 4 for identification.)

THE COURT: You are offering this, are you, Mr. Galiher.

MR. GALIHER: Yes, ma'am.

MR. PETTIBONE: No objection, Your Honor.

THE COURT: Admitted, No. 4.

(Plaintiff's Exhibit No. 4 was received in evidence.)

By MR. GALIHER:

Q. Can you refer briefly to some of the efficiency standards you were required to maintain at that time? A. With reference to Air Force Regulation 60-2, all pilots are required to fly a minimum of 15 hours of night flying per year, of which a minimum of 6 must be in one six-month period. Pilots are required to fly a minimum of 10 hours of instrument flying in any one year. Minimum total of 100 hours of all types of flying, of which 35 hours must be in any one six-month period.

Q. Did you have in May of 1958, a federally recognized, by the United States Air Force, Air National Guard commission? A. To the best of my belief, yes.

51 MR. PETTIBONE: I object to the form of the question, it refers to a type of commission which is nonexistent. It is either the United States Air Force commission or an Air National Guard commission, or perhaps some other kind of commission. I therefore object to the form of the question on the ground it is misleading and not susceptible to answer in that form.

MR. GALIHER: He did not seem to have any difficulty. Mr. Pettibone can cross-examine him.

THE COURT: I will hear the question.

(The question and answer were read by the reporter.)

THE COURT: I overrule the objection.

By Mr. Galiher:

Q. Did you at that time receive flying pay as a result of being commissioned and federally recognized as on flying status? A. Yes, sir.

Q. And of course, you were required to give the certain flight time that you have mentioned? A. Yes, sir.

Q. To maintain this rating as a pilot which you have mentioned to us, were you required to do anything other than as outlined in 60-2? A. I believe that 60-2 covers all
52 of the required minimums to maintain the rating.

Q. Now, did you tell us that on or about May 16 of 1958, you had a duties change in the air technician job as a result of orders received? A. Yes, sir.

Q. From whom were those orders received? A. Col Kilkowski.

Q. Then I believe you stated you took over the duties of aircraft maintenance chief? A. That is correct.

Q. You also indicated that those duties consisted of supervision and control of these vehicles and aircraft. When aircraft needed repairs at the base, what would you, or the employees under you, do, Captain McCoy? A. Repair them.

Q. Well, if they needed materiel or spare parts, where would you get the spare parts? A. Through the normal supply channels, I am not too familiar with their internal procedures.

Q. Would you secure the parts from a United States Air Force facility? A. More than likely, yes.

Q. I believe you so testified in your deposition at page 66-67. Suppose one of the aircraft under your maintenance and control was so damaged that you felt it could not
53 be satisfactorily repaired, what would you do in order to dispose of it? A. I would contact the Air Force Base or Depot that had prime responsibility for that aircraft and so report, in my opinion, it was beyond economic repair.

Q. And would you then wait for a decision from that base as to what should be done with the aircraft? A. That is correct.

Q. Will you tell us if your duties or I should say responsibilities of an aircraft maintenance officer, are also outlined in the Air Force Regulations, Manuals or Orders? A. Yes, the job description is outlined.

Q. On May 16 of 1958, I think you have indicated to us that your status was changed from base maintenance supervisor to aircraft maintenance chief; am I correct as to that? A. That is correct.

Q. Well, did you continue, however, to perform the duties of the other job because of the absence of someone from the base? A. Yes, sir.

Q. And who was the person who was absent and where was he, so far as you know? A. That was Major Jesse D. Mitchell, he was attending schools at Chanute Air Force Base. He would be the base maintenance supervisor, had he been there.

54 Q. When you flew, as you have indicated you did on various occasions, what was the purpose of the flights that you took? A. To satisfy the 60-2 minimum requirements, for one, and as aircraft maintenance chief, or in case of base maintenance supervisor or aircraft maintenance officer, to evaluate the quality of maintenance on the equipment, perform functional check flights on the equipment.

Q. What do you mean by functional check flights on the equipment? A. Technical Order 1-1-300 prescribes certain types of functional checks that are made on aircraft that have undergone certain repairs and/or inspections.

Q. Whose order is that, that you have just identified? A. This is a United States Air Force published TO, I suppose.

Q. TO means Technical Order? A. Yes.

Q. And were they also for the purpose of increasing your pilot rating? A. That is correct.

Q. Will you state whether or not you were required to pass any sort of a physical examination by the United States Air Force periodically? A. I had to have an
55 annual physical examination. This is entered on an Air Force form, the results are entered on an Air Force form, I assume it is an Air Force requirement.

Q. What about the United States Air Force requirement with respect to equipment, with respect to flying and equipment, were you required to periodically pass an inspection with respect to that? A. Could you restate the question, please?

Q. I am talking about an annual United States Air Force examination having to do with your proficiency in flying and the equipment maintained under your supervision and control. A. There is requirement for periodic evaluation of a pilot as to his capability for flying instruments, his general overall proficiency, and these are usually annually. As far as a requirement annually to check equipment, I know of none.

Q. Now, what was your status as far as the month of May, 1958, was concerned respecting the accruing of points toward your possible retirement some years hence, and what were you required to do? A. There are various ways that you can accrue retirement points, one being the number of days that you are on active duty for training, completing certain courses by correspondence, I believe the flying training period that the pilots are authorized.

THE REPORTER: May I read the answer back?

56 (The reporter read the answer to the witness to check it; the witness made no response.)

By MR. GALIHER:

Q. Were all those with respect to the Air National Guard of the United States? A. They apply to the Air National Guard, yes.

Q. And were you also complying with regulations which would provide you with a pension some years hence? A. Yes, sir.

Q. From the United States Government? A. Yes.

Q. In the event of injury in line of duty, what hospitalization benefits were you entitled to? A. I had protection or coverage under the Federal Employees Compensation Act.

Q. Was that as an air technician or was that as a pilot? A. I believe this applies only as an air technician.

Q. Well, would you also be entitled to hospitalization benefits because of your Air National Guard status? A. To the best of my belief, if I was on active duty for training and had some in line of duty injury or illness, I would be hosptialized at the Government expense.

Q. Well, apart from your compensation benefits under the United States Employees Compensation Commission, you were entitled to certain other benefits by virtue of
57 your status as a pilot, were you not? A. I can't answer you, Mr. Galiher, I am not sure. I say again that——

Q. If you are hurt in your military capacity, are you entitled to certain benefits which you otherwise would not be entitled to in your civilian capacity? A. To the best of my belief, I would have full protection if I was hurt in a military capacity, yes.

Q. At page 99 of your testimony, with respect to this, you said:

> "Insofar as sick leave in the military status, I don't know the policy, if there is such a thing, but it is my understanding that in the event of injury in line of duty, it is investigated to determine if it is first in line of duty, a line-of-duty-type of injury, and benefits are received from a military hospital, or a designated hos-

pital by the military. This is in the Air National Guard military status."

Does that refresh your recollection? A. Yes.

Q. As a result of the accident of May 20, 1958, were you taken to the United States Public Health Service Hospital? A. Yes, sir.

Q. And who paid your bill for the treatment that
58 you received there? A. I believe the Federal Government paid it.

Q. Did that also include your doctor who attended you while you were in the hospital? A. I suppose so, I didn't pay anything.

Q. Had you had occasion with respect to other employees, civilian employees at the base being injured while in line of duty, had you occasion to have anything to do with the making of claims for them before the United States Employees Compensation Commission? A. On some occasions, I would testify by signature that one of my subordinates had been injured in line of duty, to have him admitted to the United States Public Health Service Hospital.

Q. Did you make an application for compensation to the United States Employees Compensation Commission as a result of the airplane accident, Captain? A. I don't exactly know what the procedure was that was followed at that particular time. I am positive that at some time we executed the necessary papers.

MR. GALIHER: Your Honor, to eliminate any possible objection, at this time we are extracting the forms from the file which seem to just particularly apply to Captain McCoy and we can then show them to him and have them marked.

59 By MR. GALIHER:

Q. The first form I would like to show you, Captain, has down in the lefthand corner: "Signed by Captain

George J. Windish due to the fact that Captain McCoy's hands are burned and he is unable to sign at this time."

Would you take a look at it and see if that was filled out in your presence? A. I recall that I authorized Captain Windish to sign for me by verbal approval, but I am not clear on the particulars of when it was executed.

Q. You were in the hospital at the time? A. That is correct, yes.

MR. GALIHER: Your Honor, may the entire compensation file be given a number, it has simply been marked for identification and it has not been introduced in evidence and I would like to introduce this document that he has just identified as whatever the number will be, A.

THE CLERK: Plaintiff's Exhibit No. 5.

MR. PETTIBONE: With the Court's permission, I would like to ask the witness just one question.

THE COURT: Very well.

By MR. PETTIBONE:

Q. Captain McCoy, were you familiar with the contents of this form, that is to say, the information which it contained which is typewritten in it, at the time you
60 authorized Captain Windish to sign it for you? A. I can't be sure, Mr. Pettibone, I don't recall.

MR. PETTIBONE: Your Honor, I have to object to the admission of the form at this stage, at least, of the proceedings because it appears from the witness' own statement that he wasn't familiar with the contents of it at the time it was executed. He has merely testified so far, that he authorized someone to sign something. That is not a complete and proper foundation to make this document material in this litigation at this point.

By MR. GALIHER:

Q. Captain McCoy, is there anything incorrect or untrue on this form? A. I believe all the information is correct; yes, sir.

MR. GALIHER: I would like to offer it into evidence at this time, Your Honor, on the basis of his testimony plus the testimony this morning indicating that this is a part of a file which was made in accordance with the rules and procedure of the Bureau of Employees Compensation Commission.

THE COURT: This file has not been marked, I don't believe, with any number for identification or otherwise.

MR. GALIHER: That would then be 5-A, may it be so marked?

THE COURT: You want this file marked 5 for identification and this Form 5-A, is that correct?

61 MR. GALIHER: Why don't we take this file, which we have now disassembled because we will be using several documents at this time and several later on, and I think it will be better for it to go in this way.

THE COURT: You don't plan on offering 5 for identification, being the record that Mr. Skahan brought?

MR. GALIHER: I intend to offer it, but I intend to offer it in different stages because there are certain documents executed by different individuals who will be here.

THE COURT: The reason I was asking you, I understood you to say you wanted this attached to something as 5-A.

MR. GALIHER: I am sorry, I didn't make myself clear, Your Honor. The whole file I would like to have designated as 5 for identification.

THE COURT: Very well.

MR. GALIHER: Then I would like to introduce this as 5-A, with the thought that I will introduce other documents from the same file with other numbers, 5-A, B, C, D, and so forth.

THE CLERK: Plaintiff's Exhibit 5 for identification and Plaintiff's Exhibit 5-A for identification.

(File of Bureau of Employees' Compensation was marked Plaintiff's Exhibit No. 5 for identification.)

62 (Form C.A.1 dated 30 May 1958, for McCoy, was marked Plaintiff's Exhibit No. 5-A for identification.)

MR. PETTIBONE: At this point, the defendant still objects to the admission of the document on the ground that its pertinency to this litigation has not been shown.

THE COURT: The only document that is offered at this time is this Plaintiff's 5-A, the document just shown to the witness. As I understand it, this document was a part of the documents in this record produced by Mr. Skahan this morning; is that correct?

MR. GALIHER: Yes, ma'am, that is correct.

MR. PETTIBONE: That is true, the documents which were merely marked for identification. The point which the defendant wishes to make here, however, is that all of these documents currently have something to do with some administrative determination of some kind which may have been made by the United States, although that has not yet been developed by any testimony, but there is no showing and no indication that any such administrative determination, even if one had been made, would either be admissible in this proceeding or have any bearing whatsoever upon this proceeding; therefore, it is the defendant's contention that this document has no materiality insofar as the record stands at this point.

63 THE COURT: I will overrule the objection. 5-A is admitted.

(Plaintiff's Exhibit No. 5-A was received in evidence.)

By MR. GALIHER:

Q. I would like to show you next, Captain McCoy, a copy of a letter addressed to you under date of June 6, 1958, which is signed Stuart Rothman, Solicitor of Labor, by William B. Wright, Chief, Subrogation Branch. Would

you please take a look at that and see if that was received by you? A. I recall receiving a letter like this, yes.

MR. PETTIBONE: Your Honor, defendant repeats the same objection, this appears to be part of some administrative proceeding which has not been shown to be material in any way to this proceeding and which, in any event, would not be binding or have effect in this proceeding, in this case.

MR. GALIHER: Your Honor, the testimony shows that this file, in the process and procedure, was not only in accordance with the procedures of the Department of Labor, but in accordance with the procedure of the Employees Compensation Act. This is one of the letters in connection with the handling and processing of the file. The only way Your Honor can get the true picture is to look at these documents.

I would like to offer that as 5-B, please.

THE CLERK: Plaintiff's Exhibit 5-B for identification.

64 (Letter dated June 6, 1958, to Mr. McCoy from Mr. Wright, was marked Plaintiff's Exhibit No. 5-B for identification.)

THE COURT: This is a letter that was written to this witness?

MR. GALIHER: In connection with his compensation claim, yes, ma'am.

THE COURT: By the Labor Department?

MR. GALIHER: Yes, ma'am.

THE COURT: And is from this same file that Mr. Skahan brought here?

MR. GALIHER: Yes, ma'am.

THE COURT: I overrule the objection, admitted.

(Plaintiff's Exhibit No. 5-B was received in evidence.)

By MR. GALIHER:

Q. Are these two letters likewise copies of originals sent to you, under the date set forth, from the same gentleman? A. I recall getting letters of this nature.

Q. Is this document a copy of an agreement that you signed in connection with your claim? A. It is, yes.

THE COURT: Mr. Galiher, we are going to suspend now. You can begin with that when we take up again.

65 MR. GALIHER: All right.

THE COURT: I would like to inquire as to how long you think this case will take.

MR. GALIHER: Well, as I understand, Your Honor, there are two witnesses who will give oral testimony on behalf of the plaintiffs, one besides Captain McCoy, that is Col. Kilkowski. We will have other deposition testimony and I understand that Mr. Pettibone has only one witness that he will call. I don't know that he has changed his mind.

MR. PETTIBONE: That is correct; however, I will wait until after the cross-examination of Captain McCoy and Col. Kilkowski, which I regret may be of some length.

THE COURT: Well, tomorrow is a holiday, so we will resume on Wednesday.

MR. GALIHER: You would prefer me to hold these until Wednesday, these documents?

THE COURT: Yes, I don't believe he has examined them as yet.

MR. GALIHER: Yes, he has, he has examined them.

THE COURT: Very well, we can take those up the first thing Wednesday morning.

(Whereupon, at 4:30 p. m., the hearing was adjourned, pursuant to reconvening on Wednesday, May 31, 1961, at 10:00 a.m.)

66 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1236-59

State of Maryland
for the use of
Mary Jane Meyer, etc.
Plaintiff

v.

United States of America
Defendant

Civil Action No. 1237-59

State of Maryland
for the use of
Vance Lewman Brady, etc.
Plaintiff

v.

United States of America
Defendant

Civil Action No. 1238-59

Capital Airlines, Inc.
Plaintiff

v.

United States of America
Defendant

67 Washington, D. C.
Wednesday, May 31, 1961

The above-entitled actions came on for further hearing before the HONORABLE BURNITA SHELTON MATTHEWS, United States District Judge, at 10 o'clock a.m.,

on motion to determine a preliminary issue which is as follows: Was Captain McCoy an employee of the United States acting in the scope of his employment within the purview of the Federal Tort Claims Act at the time of the occurrence:

APPEARANCES:

On behalf of the Plaintiffs:
RICHARD W. GALIHER, ESQ.
LOUIS G. DAVIDSON, ESQ.
PETER J. McBREEN, ESQ.

On behalf of Defendant United States:

RUSSELL O. PETTIBONE, ESQ.
HARRY N. STEIN, ESQ.
MILAN M. DOSTAL, ESQ.
Department of Justice

LT. COL. ROBERT A. PRINCE, USAF
MAJOR ROBERT D. BLACKMAN, USAF
Office of Judge Advocate General

68 PROCEEDINGS

THE CLERK: Capital Airlines v. The United States.

MR. GALIHER: May it please Your Honor, before Captain McCoy resumes the stand, may I simply call your attention, if I may, to two pages from the deposition of General Wilson which you read the other day?

THE COURT: Yes.

MR. GALIHER: The first page is page 57 of his testimony and this question was asked of General Wilson:

"Question. You felt it was desirable for the maintenance officer to have a flying status?

"Answer. I think it is desirable for the maintenance officer as well as the base detachment commander.

"Question. Why is it necessary that it be mandatory that the operations officer have a flight rating?

"Answer. If he is going to be an operations officer and be responsible for the operations of the unit, he has to fly with the unit."

THE COURT: Did you say page 57?

MR. GALIHER: Yes, ma'am. I am now in the middle of the page:

"The operations officer in all Air Force units are required by the UMB to be rated pilots.

69 "Question. Why is it desirable for your maintenance officer to have a flight rating?

"Answer. I feel a maintenance officer should be able to check his own airplanes. I mean if I were a squadron commander, I would insist on my maintenance officer being a rated pilot. It gives the pilots, the other pilots, certainly a safe feeling if they know the guy that is doing the maintenance is also going to fly the airplane."

And then on page 93, the testimony of General Wilson, referring to Captain McCoy, about one-third of the way down:

"Question. Was he not employed pursuant to Title 32, Section 709, under the National Guard, under the law applying to the National Guard, this having to do with caretakers and caretakers and clerks?

"Answer. That is correct."

I remind Your Honor that I introduced that regulation from the United States Code Annotated, Section 709, of Title 32 into the evidence the other day.

Captain McCoy, would you please resume the stand?

Whereupon,

Captain Julius R. McCoy

resumed the stand and testified further as follows:

70 Direct Examination—(Resumed)

MR. GALIHER: Your Honor, when we suspended Monday, these three photostatic copies of originals from the Bureau of Employees Compensation file had just been exhibited to Captain McCoy. Your Honor will see that two of them are letters from Mr. Rothman by Mr. Wright, from the Solicitor of Labor by the Chief, Subrogation Branch, under date of July 14 and August 28, and the third one is an agreement obviously prepared by the Bureau of Employees Compensation Commission and it is a copy of an agreement signed by Captain McCoy. I have just shown these to Mr. Pettibone, they have not been marked yet for identification.

May I mark them with the same number 5, with the next letters of the alphabet, the three?

THE COURT: You may mark them for identification.

MR. GALIHER: Yes, ma'am.

THE CLERK: Plaintiff's Exhibits Nos. 5-C, 5-D and 5-E for identification.

(Letter dated July 14, 1958, to Mr. McCoy from Mr. Wright, was marked Plaintiff's Exhibit No. 5-C for identification.)

(Letter dated August 28, 1958, to Mr. McCoy from Mr. Wright, was marked Plaintiff's Exhibit No. 5-D for identification.)

71 (Agreement dated October 3, 1958, signed by Julius R. McCoy, was marked Plaintiff's Exhibit No. 5-E for identification.)

THE COURT: Will you pass them over to the other side so they may see what they are.

MR. GALIHER: Yes, ma'am.

THE COURT: The ones that are admitted were, first, Plaintiff's 5-A which is a notice signed by somebody for Julius R. McCoy. Now, this Plaintiff's Exhibit 5-B, which also was admitted, is a letter and while I admitted it, I don't believe this letter comes within the shop book rule.

MR. GALIHER: The letter should be read by Your Honor in connection with this agreement which I would now like to offer into evidence.

MR. PETTIBONE: I am going to object to the admission of this evidence. I don't believe there has been any showing yet that it is in any way relevant to this proceeding. This apparently relates to some administrative proceeding in the Bureau of Employees Compensation. There is no showing this has any relevancy to the proceeding before the Court which is now on trial. In any event, I believe plaintiff should be called upon to explain in what way it is relevant or material to this proceeding.

THE COURT: I am going to reverse the ruling on
72 Plaintiff's Exhibit 5-B and reject it. I don't know what these others are.

MR. GALIHER: May I remind Your Honor that this entire file is one which, according to the testimony of the witness Skahan, reflected the usual practice and procedure followed in connection with the handling of a compensation claim involving an employee of the United States. The letter which Your Honor has just referred to is a letter which reflects a procedure followed by the Bureau of Employees Compensation in every case where there is a possibility of a third party action against someone that will permit, if pursued, the United States of America to be reimbursed.

THE COURT: Just a minute. This man is on the stand here and he is certainly able to tell you what agreement he entered into, if he entered into any, with the United States. I don't believe it is in the regular course of business for a person to write this letter. I would think that the letter would depend upon each individual case.

MR. GALIHER: Well, I have just asked to introduce the agreement which he entered into with the United States and which he has identified; that is before Your Honor.

THE COURT: What is the number?

MR. GALIHER: That is the last one—there it is, Your Honor.

THE COURT: Well, have you said all you wanted to
73 say about this?

MR. PETTIBONE: No, Your Honor. The agreement is, I believe, part of the administrative proceeding of some kind in the Bureau of Employees Compensation. It is tied into and is part of that, it comes from the Bureau's file in connection with that proceeding. It is part of the file which Mr. Skahan brought to this Court in response to a subpoena.

Now, I don't know what purpose plaintiff has in mind in trying to bring before the Court the administrative proceedings of the Bureau of Employees Compensation in regard to some claim which was apparently filed by Captain McCoy for injuries which he sustained in this accident. I would like to point out, however, to the Court that in the event plaintiff has in mind that any decision made by the Bureau of Employees Compensation of the Department of Labor is res judicata of any issue which may be pending before this Court in this litigation, in accordance with well established authority and in accordanee with the rule laid down by the Supreme Court of the United States itself, that may not be used for such purpose in a proceeding of this kind because it has no valid or binding effect upon this Court.

Particularly, I refer to the decision of the Supreme Court of the United States in the case of Pearson v. Williams, that was a case decided back in 1906. The citation of Pearson v. Williams is 202 U.S. 281, 26 Supreme Court
74 608, 50 Lawyers Edition 1029.

THE COURT: And the ruling there was what?

MR. PETTIBONE: Well, let me explain briefly the details of this case. In that case, an alien after a hearing before a Board of Special Inquiry had been admitted to the United States. Later, a proceeding for deportation was commenced in which the same issues were adjudicated a second time with an opposite result. The Supreme Court held, and I quote from the Court:

> "The board is an instrument of the executive power, not a court. . . . Decision of a similar type long have been recognized as decisions of the executive department, and cannot constitute res judicata in a technical sense. . . . The decisions necessarily are made, as we have said, in a summary way, in order to reach the 'prompt determination' declared by the act"—the reference being to the Immigration Act—"to be an object. The board has no power to compel witnesses to attend, but, as was said by the Circuit Court of Appeals, must decide upon such evidence as is at hand or is readily accessible. These are considerations against the likelihood that Congress meant such decisions to be binding upon the Secretary of Commerce and Labor, the superior officer of the members of the board."

75 I refer the Court to this case because it appears to be the leading case in a line of similar decisions which have been frequently referred to whenever this problem has arisen before the Court.

THE COURT: I don't believe that question has been raised here at all.

MR. PETTIBONE: The reason I bring up this point is this, I can't see what purpose the introduction in the evidence of any of the records of the Bureau of Employees Compensation could have upon the proceeding with which we are here concerned or the issue before this Court.

THE COURT: I would think it would be what we are all here for, to throw light on what the employment was of the officer and what his status was at the time.

MR. PETTIBONE: Defendant has not objected to the introduction of the statement, the Form C.A.1, I believe it was called, which is the statement of the employee which was executed on behalf of Captain McCoy. We had testimony that he couldn't sign it because of his injuries, the defendant did not object to the introduction of that nor do we; that, I believe, is exactly what Your Honor has in mind by the statement just made. Insofar as it relates to his injuries, we do not object. What we do object to is the introduction of any other record made by the Bureau of Employees Compensation which goes in any way to
76 show what action they took or what conclusions they reached, because that is merely an administrative determination which cannot have any legal effect or standing in this proceeding. We do not, however, object to these other statements by the witness, such as Captain McCoy.

THE COURT: I have concluded to admit Plaintiff's Exhibit 5-E, which is this agreement which the witness identified as having been signed by him. However, this is a photostat, I believe. You have no objection to a photostat being used instead of the original?

MR. PETTIBONE: We have no objection to that, Your Honor.

THE COURT: As to these other offered exhibits, Plaintiff's 5-C and 5-D, the objection will be sustained.

MR. PETTIBONE: Thank you, Your Honor.

(Plaintiff's Exhibit No. 5-B, previously received in evidence, was excluded by the Court.)

(Plaintiff's Exhibit No. 5-E was received in evidence.)

MR. GALIHER: At this point, I would like to call Your Honor's attention to Title 5, Section 751, of the United States Code Annotated.

THE COURT: Title 5, Section what?

MR. GALIHER: Section 751 which reads:

77 "Disability or death of employee; willful misconduct. The United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty."

The balance of that section deals with willful misconduct and is not applicable. I would like to also call Your Honor's attention to the same Title, Section 776:

"Subrogation of United States to employee's right of action; assignment by employee; disposition of moneys collected from person liable:

"If an injury or death for which compensation is payable under this chapter is caused under circumstances creating a legal liability upon some person other than the United States to pay damages therefor, the Commission may require the beneficiary to assign to the United States any right of action he may have to enforce such liability of such other person or any right which he may have to share in any money or other property received in satisfaction of such liability of such other person, or the Commission may require said beneficiary to prosecute said action in his own name.

"If the beneficiary shall refuse to make such assignment or to prosecute said action in his own name
78 when required by the Commission, he shall not be entitled to any compensation under this chapter.

"The cause of action when assigned to the United States may be prosecuted or compromised by the Commission and if the Commission realizes upon such cause of action, it shall apply the money or other property so received in the following manner: After deduct-

ing the amount of any compensation already paid to the beneficiary and the expense of such realization or collection, which sum shall be placed to the credit of the employees' compensation fund, the surplus, if any, shall be paid to the beneficiary and credited upon any future payments of compensation payable to him on account of the same injury."

By Mr. Galiher:

Q. Captain, I believe you told us that your hospital bills, your surgical bills or medical bills, were paid by the United States as a result of this accident? A. That is my belief, yes.

79 Q. And your compensation continued to go on at the regular rate while you were disabled? A. That is correct.

Q. And you were paid by United States Treasury Department check? A. That is correct.

Q. Captain, I neglected to ask you this on Monday. Would you tell us, please, your history prior to 1952 with respect to flying? A. I graduated from flying school in August of 1944, was commissioned a second lieutenant, aeronautical rating pilot, and retained that until December of 1945, at which time I was separated from the active service and reverted to Reserve Corps status; and with the exception of a short time in the West Virginia National Guard as a second lieutenant in the Infantry, I remained in the Reserve Corps until 1952 when I joined the Air National Guard of Maryland.

Q. And then I believe you gave us your history there, including the training program at Chanute Field, the United States Air Force Base? A. That is correct.

Q. Now you told us also, that you pursued a 40-hour week as an air technician or I should say acting maintenance supervisor and aircraft maintenance chief, and you also told us that there were certain hours in connec-

80 tion with your military status which you were required to pursue. Am I correct as to that? A. That is correct.

Q. What were the hours and days of the week that you were required to work in your civilian capacity as a base, or rather as a maintenance supervisor, both regular and acting, as you indicated, and aircraft maintenance chief? A. They would normally be Tuesday through Saturday. I say normally, because 24 days a year we were in Reserve status, National Guard Military status, and these would normally be on Saturday which was an air technician workday, so other time was used to compensate the air technician program for that Saturday.

Q. On what day of the week did the accident happen? A. This was on a Tuesday, I believe.

Q. Do you recall what time you reported for work that day and in what status or capacity? A. I reported approximately 8 o'clock in the morning as an air technician.

Q. Will you tell us if your status as an air technician continued up to and including the time of the accident? A. That is my opinion, yes.

Q. Do you happen to recall your duties prior to the commencement of this flight on that particular day? A.

81 Certain administrative duties that are required every day to establish the order of business for the day.

Q. Would you indicate what they are, if you please? A. The determination of which aircraft would be maintained or gotten ready for flight or repaired, if necessary, and work assignments of various individuals.

Q. How many different types of planes did you have at the base? A. We had three different types.

Q. What were they, please? A. We had 25 F86H aircraft.

Q. What kind of plane is that? A. Single engine jet fighter, single seat. We had two T-33 type aircraft, that is single engine jet trainer, two seats, tandem. And we had one C-47 type aircraft, twin engine, reciprocating engine, cargo aircraft.

Q. How many persons did you have in the month of May to maintain those airplanes, I believe you said there

were 28, am I correct as to that? A. Twenty-eight aircraft.

Q. How many persons did you have who were aircraft technicians, civilian aircraft technicians? A. There were approximately 65 people, 60 or 65 people that were directly concerned with the aircraft maintenance.

Q. How many of those persons were under your
82 supervision and control? A. All of them.

Q. When was most of the flying done, Captain? A. By myself or——

Q. Of those planes, was it on weekends, was it during the week? A. They were flown throughout the week, with the weekend being the heaviest flying period.

Q. And is that because of the persons who were simply in a military status, who would fly on weekends and work on Saturday and Sunday? A. This is basically true, they had jobs other than at this airfield or other than at this Air National Guard installation and their free time to fly or to become a member of the military establishment there, would be on weekends.

Q. Approximately how many would you have out at the base on weekends? A. Flying personnel?

Q. Yes, sir. A. Approximately 35 pilots.

Q. And what about other personnel? A. Approximately 450, total.

Q. Now, the particular flight which resulted in the unfortunate collision, had that been planned before this particular Tuesday? A. I discussed this flight with Col.
83 Kilkowski on the previous Saturday, yes.

Q. What did you tell us Col. Kilkowski's status was? A. Base Detachment Commander.

Q. Was he also an air technician? A. He was, yes.

Q. In a civilian status? A. Yes.

Q. What was the basis for the flight as outlined to Col. Kilkowski on the Saturday before the Tuesday? A. One intention of my discussing this with him at that particular time was to secure approval for the passenger that accompanied me on the flight. I normally probably wouldn't

go to him personally for every flight for approval, because in my own line of duty, I perform certain flights that would not require the individual approval of the Base Detachment Commander.

Q. By the way, did you bring with you records showing the amount of flying time you had prior to May 20th? A. Yes, I did.

Q. Would you refer to those, if you please, and indicate how much flying time, let us say, you had in the 30 or perhaps 60 days prior, what sort of flights you had taken and for what purpose? A. This would take some arithmetic.

Q. Would you like a pad? A. In the three months' period of April, May and June, of course, I didn't fly after May 20th of that quarter, I flew a total of 59 hours, of which a goodly portion was flight checking the aircraft.

84

Q. What do you mean by flight checking the aircraft? A. After certain maintenance or certain inspection had been accomplished on the aircraft, they were required by the technical order I referred to on Monday, to be flown by certain personnel that were on orders as check pilots, I was one of those people.

Q. And was that in your capacity as acting maintenance supervisor and aircraft technician? A. That is my belief, yes.

Q. Now, there has been identified into evidence the flight order for this particular flight, that is Exhibit 2. Will you tell us if there were different forms of flight orders used for different types of flights at your base or if that was the type of form that was used in each instance, regardless of the purpose of the flight? A. It is my belief that this form was used for all flights, regardless of the nature of the flight.

Q. Would that also include flights in connection with the maintenance of the plane as a maintenance supervisor or aircraft technician? A. That is correct.

Q. Approximately how often would you fly the
85 plane involved in this accident or other planes at the base for flight checking purposes in your civilian capacity? A. By referring to the forms that I brought, I could give you exact days on a given month that I did fly.

Q. Would you, please? A. In April, for instance, I flew on the 8th, a functional check flight, on the 13th, the 23rd, the 24th, and the 26th.

In May, on the 4th, the 10th, the 15th, 16th and 17th. Those were all functional check flights.

Q. Had you accumulated, up to the time of the accident, more than the number of hours that you needed in order to maintain your flight status? A. I had accumulated the number of total flying hours as outlined by 60-2; however, I might not have accumulated some of the specified time, such as night or instrument, I am not aware right now whether I had accomplished those or not.

Q. This was not a night flight? A. This was not a night flight.

Q. And was the flight on the day in question a functional test flight? A. Not in accordance with the requirement as outlined in Technical Order 1-1-300.

Q. What do you mean by that? A. There is no
86 requirement by regulation for me to fly a functional check flight on this particular airplane at that time.

Q. What was your purpose in flying it on that day? A. Well, as aircraft maintenance officer and as, at that time, acting base maintenance supervisor, any time I flew an aircraft or prior to flying an aircraft, part of my intent would be to evaluate the equipment as to its maintenance, the intention that I had gotten from various people that worked for me.

Q. Would you explain what you mean by that to the Court, how you would do that? A. Well, I agree with the General that it is desirable to have an aircraft maintenance officer that also flies the equipment, because he gets a better understanding of the quality of the maintenance, he is

more able to talk to the pilots to uncover or discover certain discrepancies and get better information to more clearly know what the condition of the equipment is.

Q. What you have reference to is the qualifications contained in the Civilian Personnel Manual which has been introduced into evidence as Plaintiff's Exhibit No. 3, which provides, under the job description of "Maintenance Supervisor":

"1. Must possess six years' overall experience in all phases of aircraft maintenance and repair of allied equipment.

87 "2. Completion of an Air Force course in maintenance.

"3. Must have management background, either military or civilian."

That is under the mandatory requirements, then under "Desirable":

"1. Completion of an Air Force maintenance management course.

"2. Be a rated pilot on flying status to enable encumbent to make test flights on assigned aircraft."

Am I correct as to that? A. I don't believe that is the description of the particular job that I had. Would you give me the title again?

Q. This was Maintenance Supervisor and you told us you were acting maintenance supervisor because of the absence of Major Mitchell. A. That is correct. The aircraft maintenance chief was my job description; however, I was maintaining an acting status as base maintenance supervisor.

Q. Yes, sir. Prior to your take-off on this particular morning, May 20th, did you file an Air Force number 113 local flight plan in the operations office of the 104th

Fighter Squadron? A. I think the form is a local flight clearance and that is correct, I did file it.

88 Q. That is this document which has been introduced as Plaintiff's No. 1? A. That is correct.

Q. Was this flight that you took planned in accordance with Air Force regulations? A. It was.

Q. And from start to finish, was it made in conformance with United States Air Force regulations? A. That is correct.

Q. Now, following the accident, without telling us what occurred, were hearings conducted into the accident, number one, first by the United States Air Force, and secondly and subsequently, by the Civil Aeronautics Board? A. That is correct.

Q. Will you tell us the name of the Air Force liaison officer at your base on May 20, 1958? A. The Air Advisor was Major Milton D. Britton.

Q. Were there additional United States Air Force personnel at the base? A. There were.

Q. Can you tell us how many? A. I believe there were three additional people in his office.

Q. Were there two gentlemen by the name of Sgt.

89 Baldwin and Sgt. Storm? A. That is correct.

Q. Were they assigned to you for any particular purpose? A. They were not assigned to me at all, no.

Q. Were they members of the United States Air Force? A. They were.

Q. Were they assigned to Major Britton? A. That is correct.

Q. Will you tell us where Major Britton had his office? A. His office was in our hangar, adjacent to the Base Detachment Commander's office.

Q. Is that next to Col. Kilkowski's office? A. That is right.

Q. Can you tell us, if you know, what Major Britton's duties were at the base? A. As I said on Monday, it is my opinion that his duties would be to act as liaison be-

tween our numbered Air Force or gaining Air Force in the event we are mobilized and also coordinate with the other Air Advisers within the Wing to aid in standardization of training throughout the Wing.

MR. GALIHER: Could I please have a copy of Special Orders No. 182?

(Mr. Davidson handed the document to Mr. Galiher.)

By MR. GALIHER:

Q. Is this a copy of your orders to proceed to
90 Chanute Air Force Base? A. Yes, it is.

MR. GALIHER: May this be marked Plaintiff's No. 6, please.

THE COURT: Yes.

THE CLERK: Plaintiff's Exhibit No. 6 marked for identification.

(Special Orders No. 182, dated 13 September 1955, was marked Plaintiff's Exhibit No. 6 for identification.)

MR. GALIHER: Do you wish to check this? I would like to offer it in evidence.

MR. PETTIBONE: Just let me see it one second.

The copy which you have had marked, Mr. Galiher, is a rather poor photostat. I have a better, more legible photostat, it might be useful for all concerned to use this other copy which is much cleaner and much clearer than the other one, which is blurred.

MR. GALIHER: Thank you very much. May I substitute, Your Honor; I appreciate that very much.

THE COURT: Yes, you may.

MR. PETTIBONE: I have no objection to its admission.

THE WITNESS: I have the original, if you would rather have that.

THE COURT: You are offering this?

91 MR. GALIHER: Well, we won't take yours, you can take it back with you, thank you, Captain.

THE COURT: Are you offering this?

MR. GALIHER: Yes ma'am.

THE COURT: Well, it is admitted.

(Plaintiff's Exhibit No. 6 was received in evidence.)

MR. PETTIBONE: If the Court please, I would like to just note for the record at this time, since the deposition of Captain McCoy has been admitted, that this was a United States exhibit marked for identification in connection with that deposition; it was marked as United States Exhibit No. 2 for identification in the deposition of Captain McCoy. That is the same document which has now been admitted as Plaintiff's Exhibit No. 6.

By MR. GALIHER:

Q. Now, is this document, Captain, which has just been admitted into evidence, more or less the final document of an implementation which starts with the United States Air Force? A. Your question isn't quite clear to me.

Q. Well, is there an overall so-called manning document which starts at the top with respect to orders such as these, from the United States Air Force or the National Guard Bureau? A. Are you asking me if there is a manning document at every level?

92 Q. Well, I am asking you if there was a manning document which started the ball rolling, resulting ultimately in your receiving these orders as represented by Exhibit No. 6? A. There is a manning document for the air technician staff at our installation and a vacancy being created in this manning document allowed me to go to Chanute Field and return as base maintenance supervisor.

Q. Was that document issued to your base by the United States Air Force? A. I am not aware of where the origin of the air technician manning document was.

Q. May I refer to your testimony——

MR. GALIHER: Will Your Honor indulge me, please?

THE COURT: Certainly.

MR. GALIHER: Your Honor, I can't pick it up, may I come back to that and go on to something else now?

THE COURT: Yes.

MR. GALIHER: Will you see if you can find that testimony, please (to Mr. Davidson).

By MR. GALIHER:

Q. Well, did you previously testify, and I hope I will have the page number in a minute, that these orders were cut or issued by the Maryland National Guard probably as the last orders in the chain of command and had
93 been preceded by authority from the Secretary of the Air Force down through channels of the National Guard Bureau to the State of Maryland?

MR. PETTIBONE: If Your Honor please, I object to this question, it calls for a conclusion. There has been no showing the witness has any knowledge or information to support an answer to a question containing such a conclusion.

THE COURT: This is a question which is directed to whether or not he so testified on some other occasion.

And you may answer.

MR. PETTIBONE: Then, I withdraw the objection to that specific question.

THE WITNESS: Yes, I believe I answered that way or somewhat similar to that.

By MR. GALIHER:

Q. Thank you. You have indicated that part of your duties were to perform a flight check on planes assigned to the unit. You have indicated as to what you meant by a flight check. Am I correct as to that? A. Yes.

Q. The overall purpose of a flight check was to evaluate the condition of the equipment for its fitness for flight, was it not? A. Right.

Q. What about air readiness, such as with respect
94 to the instruments within the plane or the radio equipment? A. All of the equipment, the aircraft itself, the engine, the instruments, the controls.

Q. What about the quality of the maintenance at the installation? A. Well, I would naturally be concerned with the cleanliness of the runways, taxiways, et cetera.

Q. And did this require you to fly this equipment and this plane for that purpose and reason? A. Not necessarily.

Q. Was it desirable that you fly the plane in order to evaluate some of these things that you have mentioned? A. In my opinion, yes.

Q. Now, whenever you made these flights, were these pursuant to flight orders issued under authority of the Department of the Air Force? A. The Department of the Air Force very definitely laid down the requirement; in order to maintain an aeronautical rating, I had to comply with certain regulations issued by the Department of the Air Force.

Q. On page 357 of your testimony, referring to maintenance duties, were you asked these questions and did you answer:

"Question. Did that sometimes involve your actually flying the equipment?"

95 I would like to go back, if I may, and ask you several questions before that, on page 356:

"Question. Now, you have testified previously in this proceeding that part of your duties with the 104th Fighter Squadron was to perform what you called check-outs on planes and instruments assigned to the unit.

"What is embraced in the term check-out as you used it in that connection?

"Answer. The term I believe was flight check.

"Question. All right.

"Answer. I might be corrected on that.

"Question. All right.

"Answer. And the objective was to evaluate the equipment for its fitness for flight or for its air readi-

ness in the case of instruments or radio equipment and to monitor the quality of maintenance performed at the installation.

"Question. Did that sometimes involve your actually flying the equipment?

"Answer. It did.

"Question. As pilot?

"Answer. That is correct.

"Question. Now, when you performed such duties involving the flying of equipment for this pur-
96 pose, was that done pursuant to someone's orders, some superiors orders?

"Answer. It is desirable that an aircraft maintenance officer be able to perform this duty, and I believe that can be found in the appropriate Manuals."

Where you asked those questions and did you answer that way? A. I believe so, yes.

Q. Thank you. From time to time, Captain, did you make training flights? A. Yes.

Q. Were some of these flights made during normal working hours in connection with your air technician job, the hours of which were between 8 and 4:30 p.m., Tuesday through Saturday? A. They wouldn't necessarily be in connection with my air technician job at that particular moment, however, they were made on occasion during the air technician workday, yes.

Q. And is it true that on many instances, it was for the purpose of evaluating the equipment as you have indicated? A. This would not be a training flight.

Q. Would not be a training flight. But the flight check flights, that you have indicated you made, would be for the purpose of evaluating the equipment? A. That
97 is correct, yes.

Q. On that day, May 20th, were you carried on the roster and rolls as an acting maintenance supervisor and aircraft maintenance chief? A. I was carried as an aircraft maintenance chief and I was assuming the duties of a base maintenance supervisor.

Q. Because of the absence of Major Mitchell? A. That is correct.

Q. What were your duties as aircraft maintenance chief or acting maintenance supervisor when you were piloting a plane? A. Referring again to the 40-01, part of the job description is that it is desirable that the base maintenance supervisor, I believe, be a rated pilot. So my duties, in my opinion, would be to evaluate the equipment as described in the Manual that gives the job description.

Q. Was your status on the day of the flight and during the course of the flight and were you carried on the rolls as an air technician? A. That is correct.

Q. And an acting maintenance supervisor? A. I say again, Mr. Galiher, I was assuming the duties of maintenance supervisor, I was carried on the roll as an aircraft maintenance chief.

Q. Was there any other maintenance supervisor at the base at that time? A. Not for this job description,
98 no.

Q. And you have told us that, in Major Mitchell's absence, you were acting? A. By agreement with Col. Kilkowski, yes.

Q. Can you occupy the status of both a civilan technician and a pilot, at one and the same time, during the course of a flight?

MR. PETTIBONE: I object to that question, that calls for a legal conclusion which is the issue before this Court.

MR. GALIHER: I believe he knows what he can do, Your Honor, he is the man flying the plane, he is the acting maintenance supervisor, he is the aircraft technician, he also is a captain in a military status. I submit if he is not qualified to answer that question, then no one would be able to. I certainly think Your Honor is interested in getting that information.

THE COURT: You are not to answer the question at this time.

Will you read the question?

(The question was read by the reporter.)

THE COURT: I will sustain the objection to that question.

By Mr. Galiher:

Q. In your status as you have indicated, under
99 the Section 709 caretaker status, what other duties as an acting maintenance supervisor or as an aircraft technician did you have at the base? A. I was on orders as a flight check pilot, test pilot, part of my duties would be to flight check the aircraft.

Q. And did the job, in your opinion, require you to fly this plane and other planes to observe the condition of the plane and the field? A. As a rated pilot and as the maintenance supervisor or acting maintenance supervisor, I felt I was in a position to better evaluate the equipment and the maintenance being performed than anyone else on the base, I don't know that there is a legal requirement or definite requirement for the maintenance supervisor to fly the aircraft, but I felt and I think the Commander felt that I would have a better understanding of the quality of maintenance than anyone else on the base.

Q. Now, you had a military pilot's rating, did you not? A. That is correct.

Q. That authorized you to fly the United States-owned planes at your base, did it not? A. That is correct.

Q. If I had a civilian pilot's rating, would that authorize me to fly the planes at your base? A. No.

Q. But does that have anything to do with the
100 purpose for which you might be flying at a given time? In other words, the fact that you had a pilot's license in the Air Force permitted you to fly this particular plane, did it not? A. That is correct.

Q. It did not prescribe the use that you were to make of the plane at a given time, did it? A. The aeronautical rating? No.

Q. And sometimes you might fly it in your capacity as a maintenance supervisor or aircraft technician, and sometimes you might fly it in your status as a military pilot, is that right?

Mr. Pettibone: If the Court please, the same objection

as the previous one, this calls for a legal conclusion, that is the issue that is before this Court.

MR. GALIHER: I think certainly he knows, as a result of his training of many years with the Air Force, with his reading of rules and regulations, what he can do and can't do and what his status is, Your Honor.

THE COURT: This other question was directed to what he could do, not what he did do, and therefore I sustained the objection to it.

Now, this question has to do with what he did, I believe it uses the word "might." Read the question.

(The question was read by the reporter.)

MR. GALIHER: I am asking what he did at various 101 times.

THE COURT: You may answer, with this amendment.

THE WITNESS: It is my opinion I flew in both of those statuses.

By MR. GALIHER:

Q. At the time of the accident, were you flying it in your capacity as a caretaker of Government property? A. That is my opinion, yes.

MR. GALIHER: Would Your Honor excuse me once more?

MR. PETTIBONE: May I ask the reporter to read the last question and answer?

(The reporter read the last question and answer.)

MR. PETTIBONE: I move that question and answer be stricken from the record, that calls for a legal conclusion, it is the issue that is before the Court.

MR. GALIHER: I will ask him to give the reason for his answer, Your Honor, and you can evaluate it. Again I say this man has identified himself as a caretaker under 709 of the United States Code Annotated, he has indicated that he occupies a civilian status as well as a military status, and he has indicated that sometimes he occupies

one and sometimes the other; and certainly he is in a position to know, as is no one else.

THE COURT: Well, I will permit the answer to
102 stand. At this time, we will take a recess of five minutes.

(A short recess was taken.)

By MR. GALIHER:

Q. Captain McCoy, General Wilson has testified in his deposition that you were employed pursuant to Title 32, Section 709, National Guard, under the law applying to the National Guard, this having to do with caretakers and caretakers and clerks. Does that constitute a correct description of your civilian job? A. I read that, yes, that is my opinion.

Q. Were there some occasions, in connection with your flight checking of airplanes, when it was absolutely necessary to take them off the ground because you could not check maintenance equipment in any other way? A. That is correct.

Q. Can you give us an account of the flying that you did of different planes at the base, apart from the one involved in this accident?

MR. PETTIBONE: If the Court please, I am going to object to that question, I can't see any relevancy to this proceeding at all to have him discuss what other flying he did. He has already stated he had a considerable amount of flying experience before the day in question. I don't see the necessity of going over all the details of that, I see no relevancy.

103 THE COURT: Read the question.

(The question was read by the reporter.)

MR. GALIHER: In order to check the maintenance equipment and so forth, that is what I have in mind, Your Honor.

THE COURT: The objection is overruled. You may answer.

THE WITNESS: Again referring to this document that I brought with me, which is a record of my flying time, on the 8th of April, I flew an F86E, performed a functional check flight. On the 13th of April, I flew an F86H for functional check flight. I am trying to just pick out the different types.

By MR. GALIHER:

Q. Yes. A. On the 9th of July of 1957, I flew a T-33A, performed a functional check flight. Those three types, at least.

Q. I think that will do without you looking any further in the record. Now, at the time of the accident, I think you have told us that you were in the status of an acting maintenance supervisor and aircraft maintenance chief. Does that mean that you were receiving pay in that capacity on that day and at the time of the flight? A. That is correct.

104 Q. Did you receive any flight pay for the day of the accident? A. I couldn't attempt to tell you just what portions of the flying time was labeled as that part that would qualify me for flight pay. I don't know that particular day to be——

Q. I see. Did the United States Air Force designate a flying area in and around your base for your planes to use? A. I believe that the area is defined by the local Commander, certain regulations require him to define an area.

Q. Were you flying within the area at the time of the accident? A. I was.

Q. Did you have a number of different titles in connection with various jobs which you performed at the base in 1958, for example, you have indicated that you were an aircraft maintenance chief. Were you a member of the Federal Recognition Board? A. I don't recall exactly what all the additional duties were, I was on the Standardization Board.

Q. Was that a Federal or State Board? A. These would all be local Boards.

Q. What about the Federal Recognition Board? A. I don't recall whether I was on that Board or not.

Q. What about the Air Force Aid Society Board?

105 A. I belonged to that.

Q. Was that a Federal Board? A. That was a local Board. I don't know the authority or the requirement to establish these Boards.

Q. Oh, I see. I won't ask you about those, then.

You had a gentleman riding with you at the time of the accident, by the name of Chalmers? A. That is correct.

Q. Were you trying, in addition to the other reasons for the flight that you have indicated, were you also interested in interesting him in the United States Air Force Aviation Cadet program? A. I had talked to him on several occasions about the possibility of joining the Air Guard as opposed to the Ground Guard that he was in at the time of the accident.

MR. GALIHER: Excuse me, Your Honor.

Your witness. Thank you, Captain.

Cross-examination.

By MR. PETTIBONE:

Q. Captain McCoy, have you been made a party to any litigation arising out of the accident on May 20, 1958? A. There are several suits pending, I understand, that have my name on them.

Q. Are you a party in any of them? A. I am not familiar with your legal term, Mr. Pettibone, could you tell

106 me exactly what that means?

Q. Are you a defendant, have you been served with a summons and complaint in any actions in any Courts arising as a result of this airplane accident on May 20, 1958? A. I have.

Q. Could you tell us in about how many actions you have been made a defendant in such manner? A. I don't know the exact number, Mr. Pettibone.

Q Approximately how many? A. I think there are probably 10 or 11 different lawsuits that probably have my name on them in some part, some capacity, rather.

Q. In fact, weren't you a defendant in those cases, weren't you the party being sued along with other defendants? A. Yes, I think so.

Q. Is the United States of America also a defendant in those actions in which you have been sued as a defendant? A. That is my understanding, yes, sir.

Q. Are you familiar with or have you been apprised of the provisions of Title 28, United States Code, Section 2676, which provides in essence that any judgment returned against the co-defendant, the United States, in those actions, will relieve you of any liability or any claims in those actions? A. Would you state your question again, please?

MR. PETTIBONE: May I ask the reporter to read the
107 question?

(The question was read by the reporter.)

THE WITNESS: That is my understanding, Mr. Pettibone, I have never had this explained to me in detail by anyone.

By MR. PETTIBONE:

Q. Are you represented by counsel in the actions which have been brought against you in these other actions? A. This is my understanding, yes.

Q. Who is your counsel in those cases? A. Mr. Mudd.

THE COURT: Mister who?

THE WITNESS: Mudd, M-u-d-d. I may be completely wrong, that is my understanding, that Mr. Mudd has been retained as my counsel.

By MR. PETTIBONE:

Q. Did you retain him? A. Not personally, no.

Q. Well——

THE COURT: Just one moment, Mr. Pettibone. Just one moment, please.

Would you put the loud speaker on the officer there (to the Marshal).

By Mr. Pettibone:

Q. Who did retain Mr. Mudd as your counsel in
108 those cases? A. Let me go back and say that I am not completely sure that Mr. Mudd is retained to represent me in those cases. I will say that Mr. Mudd has advised me or has, at least during the depositions, has been counsel and I am not completely sure just exactly who is paying him or who has retained him; from my understanding, it is the State of Maryland.

Q. Well, now, there have been some proceedings in those cases to which you are a party, such as the taking of depositions, have there not? A. Yes, there has.

Q. And you have been obliged to appear at those proceedings? A. Yes, I have.

Q. Who appeared as your counsel at those proceedings? A. Mr. Mudd.

Q. Did anyone elese appear as your counsel? A. Not to my knowledge.

Q. Did you ask Mr. Mudd to attend as your counsel at those proceedings? A. I think Mr. Mudd asked me to attend.

Q. Have you any idea how Mr. Mudd came to be at these proceedings as your counsel? A. As I stated, it is my understanding that he is retained by the State of Mary-
109 land as my counsel.

Q. Well, you say the State of Maryland; just who in the State of Maryland do you think retained him? A. Possibly at the advice of the Military Department.

Q. Did you make an application of the Military Department of the State of Maryland to provide you with counsel? A. I made no formal application, no.

Q. Did you make an informal application? A. I don't recall asking them directly to provide counsel, no.

Q. Did you ask anyone indirectly to provide you with counsel? A. I don't know how I would ask indirectly, I am not trying to be evasive, I am just not——

Q. Did you ask anyone at any time, after you were served

with process in these cases, to represent you as counsel in these cases, either in writing or verbally? A. No.

Q. Did you ever discuss the matter with anyone? A. The matter of having counsel or——

Q. The matter of having counsel and the matter of your being sued in these actions? A. Yes, I discussed the matter of having counsel.

Q. Who did you discuss it with? A. With Mr.
110 Mudd, for one.

Q. How did you come to discuss it with Mr. Mudd? In other words, did you get in touch with him or did he contact you? A. I was informed that Mr. Mudd had been retained.

Q. Who informed you that he had been retained? A. The Military Department of the State of Maryland.

Q. Who, in the Military Department of the State of Maryland? A. I recall several conversations with Col. Kilkowski or a few conversations with Col. Kilkowski, for one; General Reckord for one, General Ruhl who is no longer with the Military Department.

Q. Did any one of these gentlemen you have named advise you that Mr. Mudd had been retained as your counsel? A. Yes.

Q. What was the position of these gentlemen, by whom were they employed? A. General Reckord is the Adjutant General of the State of Maryland, General Ruhl at that time was Assistant Adjutant General, Col Kilkowski is and was Base Commander at Martin Airport.

THE COURT: Who is being sued over there, besides you and the United States?

THE WITNESS: That is all I know, Your Honor.
111 Capital Airlines might be sued over there, also.

By MR. PETTIBONE:

Q. Have you discussed your position as a defendant in those cases in which you have been sued, with Mr. Mudd, your counsel? A. Yes, I think so.

Q. About how many times have you discussed it with him? A. Probably three times, two or three times.

Q. Have you discussed it with any other lawyers at any time?

MR. GALIHER: Are you talking about position or conversation that he had with other lawyers?

MR. PETTIBONE: I will make the question more specific.

By MR. PETTIBONE:

Q. I am referring, Captain McCoy, to any discussions concerning your status or your position as a defendant in these actions in which you have been made a defendant, arising out of this accident? A. Yes, probably so.

Q. Well, with what other persons have you so discussed it? A. Mr. Clayton Dietrick.

Q. Who is he? A. He is, I believe, one of the
112 Assistant Attorney Generals of the State of Maryland.

Q. All right, are there any others? A. That is a rather broad question, Mr. Pettibone, have I discussed this with any lawyers. In what connection, is there some way——

Q. In connection with your status as a defendant in those actions? A. I don't know of any lawyers that actually have discussed my status as a defendant in the actions.

Q. Have you ever discussed with Mr. Mudd or Mr. Dietrick, the fact that the United States of America is also a defendant in those actions in which you are a defendant? A. Yes, at least with Mr. Mudd.

Q. Did you have any discussion with those lawyers concerning the fact that you were employed as an air technician in the 104th Fighter Squadron of the Maryland Air National Guard? A. I don't recall any specific reference to it, those men were aware I was an air technician.

Q. Are you aware of the fact that those cases are being prosecuted against the United States of America by the theory that you are an agent of the United States of America because of your employment as an air technician? A. I am aware that I am named with the United States of Amer-

ica as a defendant. Why we are named together, I
113 don't know, whether it is because I am an air technician or not, I don't know that.

Q. Perhaps you misunderstood my question. My question again is this: Are you aware of the fact, do you know that those actions in which you are a defendant are being prosecuted against the United States upon a theory that you were an agent of the United States because you were employed as an air technician? Do you or do you not know about that? A. I don't know why the suits were entered with me as a defendant with the United States, I assume they would be for that reason.

THE COURT: Would you read the answer?

(The answer was read by the reporter.)

By MR. PETTIBONE:

Q. Captain McCoy, are you aware of the fact that these suits in which you and the United States are co-defendants were entered on the theory that while you were flying the plane at the time of the accident, you were an air technician employed by the State of Maryland? A. I can only say, Mr. Pettibone, that apparently the plaintiffs feel that I am an agent or am an employee of the Federal Government, in my opinion.

Q. Are you finished? A. Yes.

Q. An employee of the Federal Government for
114 what reason? A. I have no knowledge.

Q. Captain McCoy, when did your military service begin? A. I believe it was February 6, 1943, when I was first inducted in the Army.

Q. That was into the United States Army? A. That is correct.

Q. What was your rank at that time? A. Private.

Q. And with what unit did you serve? A. At that time, shortly after I was inducted, I was assigned to Camp Wheeler, Georgia, for infantry basic training.

Q. And after you completed that training, what happened? A. After I completed the infantry basic training, I transferred to the then Army Air Corps and after a series of tests, I went through flying school.

Q. Where did you attend flying school? A. My first flying school phase, flying phase, was at Tucson, Arizona, and the second phase was at Bakersfield, California, and the third phase was at Phoenix, Arizona. And in Phoenix, I was commissioned and given an air officer's rating as a pilot.

Q. How much time did this training consume, before you were given a commission? A. Approximately
115 14 or 15 months after I entered the Air Corps until I was commissioned.

Q. What commission did you receive? A. Second lieutenant.

Q. Was that in the United States Army? A. I believe it was called Army of the United States.

Q. Army of the United States? A. Yes.

Q. Did you have a rating as a flying officer? A. Yes.

Q. All right. What service did you perform after that? A. In, I believe, September, the latter part of September, I attended another school to be transitioned into B-17's as a pilot.

Q. What year was that? A. 1944.

Q. Continue. A. Early 1945 or approximately late December, 1944, I went to another training school at Tampa, Florida, for crew training overseas, to train the crew for operation overseas. And then in April of 1945, I was transferred to Laredo, Texas, with a short stop-over at Alexandria, Louisiana, where I flew B-17's, gunnery evaluation program, until the end of the war, at which time I was separated and returned to my home as a civilian.

116 Q. What was the date when that military service terminated? A. It was, I believe, about the 10th of December, 1945.

Q. Did you at any time thereafter re-enter the military service? A. Well, I had an unbroken period of either

Reserve duty or National Guard duty from that day to this. In addition, I have attended some Air Force schools, three, to be exact.

Q. Well, fill us in with the details of the military service which you performed in that status, then, continuing on from 1946. A. I was an inactive Reservist until, I believe, about 1949 when I joined the West Virginia National Guard and participated in their drills and other training, and then I became active again and in 1952——

Q. Let me interrupt you just one moment. I wish you would tell us more about your service with the West Virginia National Guard. What was your rank? A. Second lieutenant and I was a platoon leader.

Q. In which branch of the service did you serve? A. This was with the West Virginia National Guard.

Q. Were you in the infantry? A. Infantry.

117 Q. Infantry? A. Yes.

Q. This was the Army National Guard? A. That is correct.

Q. How long did you serve as a second lieutenant in the infantry? A. I don't recall exact dates that I was active, it wasn't very long, because of my employment I was forced to leave the area so I had to become inactive.

Q. Well, approximately when—did you go into inactive duty again? A. That is correct.

Q. Do you remember approximately the data of that? A. That was probably in October of that year, 1949.

Q. And what military service did you perform after that? A. I was inactive until January of 1952, when I joined the Maryland Air National Guard and I have been in the Maryland Air National Guard since then. In 1944, I attended jet indoctrination school at Craig Air Force Base at Selma, Alabama, for approximately 8 weeks' duration and in 1945, in May of 1945, I believe——

Mr. Galiher: Do you mean 1954 or 1955?

The Witness: 1954, excuse me, in 1955 I attended the Jet Instrument School at Perrin Air Force Base in Texas

and returned to Baltimore in, I believe, July of that
118 year and in September of 1955, I entered into the maintenance officers' course at Chanute Air Force Base, Rantoul, Illinois, returned to Baltimore to accept an air technician's job with the Maryland Air National Guard in early June 1956, that job I held to this date with one status change.

By Mr. Pettibone:

Q. Now, in what rank or grade were you first appointed or commissioned in the Maryland Air National Guard? A. Second lieutenant.

Q. Were you subsequently promoted? A. I was.

Q. When was that? A. October of 1952, I was promoted to first lieutenant; on July 1 of 1956, I was promoted to the rank of captain.

Q. Did you make application in 1952 for a commission in the Maryland Air National Guard? A. I don't recall exactly the procedures, I was interviewed by the Base Detachment Commander and subsequently met an Officer Procurement Board and Federal Recognition Board, I suppose. I made application by virtue of walking in the door and asking them some information and if I could join.

Q. Well, did you fill out any application form? A. I am certain there must have been some paperwork that was necessary to be executed.

119 Q. And were you then issued a commission by the Maryland Air National Guard? A. I was transferred from the West Virginia National Guard or released from the West Virginia National Guard and went on the rolls of the Maryland Air National Guard as commissioned officer with no break in service.

Q. Were orders issued by the Maryland Air National Guard appointing you a second lieutenant in it? A. Yes.

Q. Was Federal Recognition extended to you in that capacity? A. Yes, the Federal Recognition was received, I believe, in April of that same year.

Q. That was subsequent to your appointment as second

lieutenant in the Maryland Air National Guard? A. That is correct, retroactive to the date of enrollment in January.

MR. PETTIBONE: I would like to have this document marked as Defendant's Exhibit No. 1 for identification.

THE COURT: Very well.

THE CLERK: Defendant's Exhibit 1 for identification.

(Extracts from Orders to Capt. McCoy was marked Defendant's Exhibit No. 1 for identification.)

120 By MR. PETTIBONE:

Q. Captain McCoy, I show you a document which has been marked as Defendant's Exhibit No. 1 for identification. Will you look at it and tell us if you know what it is? A. This appears to be a composite of certain general orders issued from the Military Department of the State of Maryland that concern myself.

Q. Might they be termed extracts from orders? A. Extracts from orders, yes.

Q. What do the orders provide, what orders are they? A. General Orders No. 47 says that the National Guard Bureau has extended Federal Recognition to following officers of the Maryland National Guard effective dates indicated. It has my name as a captain, date 1 July 1956.

General Orders No. 24, Federal Recognition for myself as a second lieutenant, dated 31 March 1952.

General Orders No. 9 has my name with the words "To be second lieutenant, Air Force, with rank from 25 January 1952," which apparently is the initial order that commissioned me in the Maryland National Guard. No. 9 also assigns me as a pilot with the 104th Fighter Squadron.

MR. PETTIBONE: Thank you. If the Court please, I would like to offer in evidence as Defendant's Exhibit No. 1, the document which has just been identified.

THE COURT: Have you shown it to Mr. Galiher?

121 MR. GALIHER: Yes, ma'am, we have no objection.

The Court: Admitted.

(Defendant's Exhibit No. 1 was received in evidence.)

By Mr. Pettibone:

Q. Now, you have stated you received a rating as a flying officer, first, in what year was that? A. The 4th of August, 1944.

Q. And did that rating as a flying officer continue in effect at all times up to May 20, 1958? A. I assume so, Mr. Pettibone. However, I did not fulfill the requirements as outlined in Air Force Regulation 60-2, consequently, I was not eligible to fly some of that period.

Q. I see. Was there a period of time, then, when you were not eligible to fly? A. There was a period of time when I didn't fulfill the requirements, that would be from December of 1945 until I was requalified in 1952.

Q. Did you requalify in 1952? A. Yes, sir.

Q. Was that by virtue of a test which you took or in what manner did you requalify? A. I had certain training to renew my proficiency in the aircraft and check-out rides with instructor pilots, to be assured that I was
122 capable of resuming my flying career.

Q. Well, did you continue in flying as a rated officer from 1952 until May 20, 1958? A. I did, yes.

Q. In order to maintain that rating, did you have any qualifications to meet or did you have to do anything? A. Yes, as I previously stated, 60-2, Air Force Regulation 60-2 requires certain minimums in night flying, instrument flying, total time, and has to be spaced so that the minimums would fall within a certain calendar portion of the year.

Q. Did you meet those requirements? A. I did.

Q. At all times? A. Yes, sir.

Q. Did you perform the flying which they require? A. Yes, sir.

Q. Are those flights called proficiency flights? A. I believe that is the general term that is given to them.

Mr. Pettibone: May I ask the Court's indulgence one moment to speak to Mr. Galiher?

The Court: Yes, certainly.

(Mr. Pettibone conferred with Mr. Galiher.)

MR. GALIHER: May I do so at this point?

123 MR. PETTIBONE: I have no objection.

MR. GALIHER: Mr. Pettibone would prefer that I introduce this as another exhibit, which is the Certificate extending Federal Recognition. May this be marked No. 7 and introduced into evidence, if the Court please?

THE COURT: Yes.

THE CLERK: Plaintiff's Exhibit No. 7.

THE COURT: Admitted.

(Air Force Regulation 45-2, dated 13 April 1949, was marked Plaintiff's Exhibit No. 2 and received in evidence.)

By MR. PETTIBONE:

Q. Did you receive pay for being commissioned an officer in the Maryland Air National Guard? A. Yes.

Q. Did you receive additional pay for holding a rating as a flying officer? A. Fulfilling the obligations, yes.

Q. What additional pay did you receive, what was the nature of it or on what was it based? A. I received pay, I think, at the same rate as the regular Air Force officer for certain periods of time, certain amount of flying time that I would accomplish in training.

Q. Now, to maintain your rating, you performed proficiency flights from time to time, is that correct?

124 A. Correct.

Q. So that you would receive additional pay; would this be called flight pay, incidentally? A. That is correct.

Q. Would you receive flight pay for the performance of these proficiency flights? A. I would receive flight pay up to a certain maximum for participating in proficiency flights.

Q. Well, in other words, you had to accumulate flying time in order to get the additional pay? A. Yes, I wouldn't have gotten the flying pay if I hadn't flown.

Q. How many hours flying time did you actually have on May 20, 1958, or if you don't remember exactly, approximately? A. Total?

Q. Total. A. I have the figure here, I think it is 1902 hours of military flying time, and 10 minutes.

Q. You say there were certain requirements which you had to meet in order to keep your flying status or rating current, is that correct? A. That is correct.

Q. And did you meet those requirements at all times? A. I did.

125 Q. If you had not met those requirements, what would have happened? A. I would have probably or no doubt would have met a Flying Evaluation Board and they would have made, probably, certain recommendations to the National Bureau and, subsequently, to the Air Force, and some action would have been taken.

Q. What action would be taken in such cases? A. It depends on the peculiars of the case or the individual concerned. It might be that he meets a Flying Evaluation Board for non-compliance due to a personal injury, or due to some other thing that might not permit him to fly, in which case the action would be to put him in another category so that he would not have to comply with the minimums. If it is non-flying for no apparent reason or for no physical difficulties, they might demand that the man be removed from flying status.

Q. Well, in the event a person was placed in such category, it would result in a loss of flight pay by the individual, is that right? A. Possibly, yes.

Q. Now, you have stated that on May 20, 1958, the day of this accident, you were commissioned as a captain in the Maryland Air National Guard, is that correct? A. I held that commission, yes.

126 Q. Did you hold any other commissions of any kind or was that the only one you held? A. As far as I know, the one commission was all that I held.

Q. Now, you were also, on May 20, 1958, employed as an air technician, as you have stated. When did you first become so employed? A. I believe that was about the 8th of June, 1956.

Q. Did you apply for that employment? A. Yes.

Q. To whom did you apply? A. To Major Scott.

Q. What was his position? A. He was Squadron Commander at that particular time.

Q. Squadron Commander of what? A. 104th Fighter Squadron.

Q. And is that a unit of the Maryland Air National Guard? A. That is correct.

Q. And was at that time? A. That is correct.

Q. Did you make a written application for employment? A. No.

Q. In what job capacity were you first employed, then?

127 A. As base maintenance supervisor, this is assuming that the job description has not changed to this date.

Q. Well, I am referring to the date when you were employed, what was the title of the job at that time? A. I don't recall whether it has been changed or not.

Q. That was in 1956? A. That is correct.

Q. And how long did you continue in that particular job in which you were so employed? A. Until May 16 of 1958.

Q. You remember what your pay was in that job during that period of time? A. I think my starting pay as an air technician was probably around seven thousand five—$7,000 a year.

Q. What happened on May 16, 1958? A. I had a job change, job title change from base maintenance supervisor to aircraft maintenance chief.

Q. Did that result in any change in your pay status? A. No, sir, not at that particular moment, no.

Q. Did you continue to receive the same amount of pay? A. That is correct.

MR. PETTIBONE: May I ask that this document be marked Defendant's Exhibit No. 2 for identification.

THE CLERK: Defendant's Exhibit 2 for identification.

128 (Extract from Special Orders No. 93, dated 13 May 1958, was marked Defendant's Exhibit No. 2 for identification.)

By Mr. Pettibone:

Q. I now hand you a document marked Defendant's Exhibit No. 2 for identification. Will you tell us what it is, if you know? A. This is a copy of the Orders issued by the Office of the Adjutant General of the State of Maryland that change my job title from base maintenance supervisor to aircraft maintenance chief.

Q. Does it indicate any effective date of the change? A. Effective May 16, 1958.

Mr. Pettibone: I would like to offer in evidence Defendant's Exhibit No. 2, the document which has just been identified by the witness. I might also add for the record that it was previously marked as United States Exhibit No. 2 at the time Captain McCoy's deposition was taken.

The Court: Admitted.

(Defendant's Exhibit No. 2 was received in evidence.)

By Mr. Pettibone:

Q. Now, on May 16, 1958, when you became aircraft maintenance chief, who was your immediate super-
129 visor? A. Col. Kilkowski was my immediate supervisor at the base; however, Major Mitchell would eventually become the supervisor when he returned from school.

Q. Well, when did he return from school? A. In November, I believe, of 1958—1957, excuse me—no, 1958.

Q. Well, is it correct, then, that at all times during the month of May, 1958, Col. Kilkowski was your immediate supervisor in your employment as aircraft maintenance chief? A. That is correct.

Q. Now, I believe you have testified that you also, on and after May 16, 1958, assumed the duties of base maintenance supervisor? A. That is correct.

Q. Was that by any means written——

Mr. Galiher: I think the testimony was he continued to act in that capacity, not that he assumed them.

Mr. Pettibone: Yes, I think that is correct.

By Mr. Pettibone:

Q. You had been base maintenance supervisor prior to May 16th? A. Yes, sir.

Q. And you continued to perform those duties after that date? A. Yes, sir.

130 Q. By whose order did you do that? A. This is by agreement with Col. Kilkowski.

Q. Were any written orders issued to that effect that you know of? A. That I be made acting base maintenance supervisor?

Q. To continue to perform the duties of base maintenance supervisor? A. I had no written orders to that effect, no.

Q. Well, did Col. Kilkowski issue verbal orders to that effect to you? A. That is right.

Q. When did he issue them? A. On or about the 16th of May, I don't recall the exact date.

Q. Do you remember when and where you were at the time he issued those orders? A. In his office.

Q. You remember just what he said about it? A. Not exactly, no.

Q. How did the subject come up? A. Well, the subject came up because of the proposed job status change.

Q. How many people does the base maintenance supervisor supervise at this installation? A. About 75 or 80 people, I think.

131 Q. Were they notified that you were the base maintenance supervisor? A. I don't recall if they were or not. That I was changed, you mean, from one status to another?

Q. No, were they notified that you would continue to perform the duties of base maintenance supervisor? A.

I think this is understood, I do this now when Major Mitchell is not there.

Q. Well, I asked you, were they notified? A. I don't know that they were notified personally.

Q. Now, in either capacity, that is to say, either as aircraft maintenance chief or as base maintenance supervisor, on May 20, 1958, was Col. Kilkowski your immediate supervisor? A. That is correct.

Q. To what extent did he supervise your work in those positions or in what manner did he supervise your work in those positions? A. On that particular day?

Q. Yes. A. Well, as any manager, I was responsible to provide him with a product or with quality maintenance, et cetera.

Q. Did he physically observe the performance of your work at times? A. Yes.

Q. Did he from time to time issue you orders or
132 directions or instructions? A. Sure he did.

Q. Did he express approval or disapproval with the way you were doing your job at times? A. There are probably instances where he would express approval and other times, disapproval, yes.

Q. Were you under the supervision—under anyone else's supervision at the same time? A. Well, he had supervisors or superiors that we were both under.

Q. Well, did anyone other than Col. Kilkowski give you orders or instructions with respect to your work, in the manner in which you just testified? A. No, I was responsible directly to him as an air technician.

Q. In other words, he was the sole person to whom you were directly responsible in that manner, is that correct? A. Yes, he was the sole person to whom I was directly responsible.

Q. There was an Air Adviser assigned to the unit for which you worked, was there not? A. That is correct.

Q. What was his name? A. Major Milton D. Britton.

Q. Were you, in May of 1958, under—did you take
133 any orders from him? A. On the day of May 20, 1958, or the month of May?

Q. Well, in the month of May, 1958? A. I very possibly could have, I don't recall any specific orders.

Q. Well, how long did he serve as Air Adviser? A. He is still there.

Q. Does he customarily give you orders of any kind? A. He wouldn't normally give me orders in line of duty as an aircraft maintenance chief; however, there might be occasions, for instance, if he was leading a flight and I was a wingman, he might have given me orders on those occasions.

Q. You mean if you were the pilot of a plane in a flight which he commanded, then he would give you orders? A. That is correct.

Q. Well, then, he would never give you orders in your capacity as an air technician? A. He could have, he could give orders if he saw an unsafe practice or mishandling of Government property, he is a major and he outranks me, he could give me orders.

Q. Did he in fact ever issue any such orders to you? A. I don't recall that he did issue any such orders.

Q. Well, you are familiar with the term "Command Authority" as it is used in the military sense, I take it, Captain? A. Yes.

Q. Did he have command authority over you, in general? A. No.

Q. Now, as a captain assigned to this unit of the Maryland Air National Guard, you were obliged to attend certain training periods? A. That is right.

Q. How many training periods did you attend per year? A. Twenty-four weekend training periods which—actually, there are 48 training periods since each of these 24 days constitutes two training days, and it is 15 days of field training in the summer and then I might accomplish, when I was flying, 36 additional training periods called flying training periods.

Q. Does this refer to the period of time up to and including May 20, 1958? A. That is correct, these are per annum.

Q. That is the period of time which I am referring to in these questions concerning your training periods. Now, was there a training schedule or program which was followed by you and others who participated in this training? A. Yes.

Q. Who issued this training schedule or program? A. The numbered Air Force that might gain this unit in
135 the event of mobilization.

Q. Well, specifically, who put out the training schedule which was followed? A. The United States Air Force.

Q. You mean the Headquarters of the United States Air Force in Washington? A. Probably the overall training program probably came out of Headquarters.

Q. Well, who conducted the actual training? A. The members of the 104th Fighter Squadron.

Q. Well, who were the members of the 104th Fighter Squadron who conducted the training in this manner? A. It could be any one of a number of people. I might also add the training could be conducted by Air Adviser officers, conducted by Air Force personnel that have mobile training teams; in existence right now at our base, we have a school going on, conducted by the Air Force, upgrading training could be conducted at an Air Force school at an Air Force Base, which was common at the time.

Q. Well, what is your authority for that statement which you just made? Can you refer me to any regulation which so provides? A. I am not familiar with the regulations by memory, no.

Q. Was any such training conducted by an Air
136 Force Adviser or the other parties you enumerated, at your unit? A. Yes.

Q. On what occasions? A. On a required basis.

Q. Well, specifically, when? A. I don't recall the exact dates. Sgt. Baldwin might conduct classes for aircraft mechanics to help them move to a higher skill level, they conducted testing on the Air Force upgrading tests.

Q. Who are these people that you are referring to, are they members of the Air Adviser's staff? A. Yes, sir.

Q. How often did they conduct this training that you say— A. It is rather a hard question to answer, as needed, let me put it that way, if we asked them to conduct training, they would conduct training for us.

Q. Once a year, once a month, once a week, how would you care to define it? A. This would vary, I can't answer the question that precisely.

Q. I am not asking you to answer precisely, I am asking you to tell me in general. A. More than once a year.

137 Q. Would that be twice a year? A. It could be.

Q. More than twice a year? A. It very well could be.

Q. How much more than twice a year? A. I don't recall, Mr. Pettibone.

Q. Did you attend these training periods? A. I probably established them or established the requirement, myself.

Q. Does that mean you attended them, yourself? A. I probably set up the requirement for them, I probably contacted the Air Adviser's office and asked that its men conduct the training.

Q. I am asking did you attend them yourself, personally? A. Not necessarily, no.

Q. Well, then, if you didn't attend them personally, do you know who conducted the training? A. Yes.

Q. How do you know, if you weren't there? A. Because I am the man, probably, that set the whole program up, Mr. Pettibone. I didn't necessarily attend the training.

Q. Captain McCoy, let me refer you to certain questions and answers which were the questions given to you at the time your deposition was taken, and your answers thereto. This is at page 83 of your deposition:

138 "Question. And who would conduct the training assemblies?

"Answer. The training program is established by the United States Air Force, conducted internally.

"Question. And how were they also put on the program?

"Answer. The actual training was conducted internally within the unit.

"Question. By whom?

"Answer: By the people in the 104th Fighter Squadron.

"Question. And who were the people in the 104th Fighter Squadron who conducted them?

"Answer. The members of the unit themselves, the various supervisors within the unit.

"Question. Can you name any of them?

"Answer. It might have been anyone. The members of the unit have to be specialists in a particular field.

"Question. You might have conducted some of them, and did conduct some of them?

"Answer. That is correct."

Were the answers that you gave at that time
139 to those questions—are they still correct? A. That is correct.

Q. Now, you have testified, I believe, that you sometimes performed functional check flights, this is prior to May 20, 1958, that I am referring to? A. That is correct.

Q. What is a functional check flight as you have used that term? A. A functional check flight is defined in Technical Order 1-1-300 as a flight—this is a generalization I am giving now—a flight to determine air worthiness of an aircraft after certain inspections and certain maintenance —and/or certain maintenance that has to be performed.

Q. Any particular kind of maintenance? A. One, specifically, would be a periodic inspection.

Q. Any other kind of maintenance involved? A. Yes, the removal and replacement of a flight control, movable flight control.

Q. You referred to Technical Order 1-1-300. What is the general nature of that Technical Order, what is the purpose of it, perhaps I should say? A. As I have indicated, this deals primarily with the laying down of the criteria for the requirement of functional checks on aircraft or equipment after maintenance and inspection.

Q. Have you actually performed these functional
140 check flights yourself—had you performed them prior to May 20, 1958? A. I have, yes, sir.

Q. Are you authorized to carry passengers on such flights? A. Technical Order reads minimum crew.

Q. What would be the minimum crew for a T-33A? A. Two people.

Q. What type of airplane were you flying at the time of this accident? A. T-33A.

Q. And how many people would it take to perform a check flight on a T-33, that is to say, a functional check flight of the type we have been discussing? A. To properly perform a functional check flight, it would require two people because of certain instruments and certain indications in both seats that you would have to observe to make comparisons, for instance, the air speed indications, altitude, and so forth.

Q. Would either one or both of the pilots have to have any special qualifications? A. They would have to have certain qualifications, yes.

Q. First of all, they would both have to be rated pilots, would they not? In other words, they would have to
141 have flying status, would they not? A. I am not too certain of that, I think this would be desirable but I am not too certain that both of them would have to be pilots.

Q. They would both have to be pilots? A. I am not too certain that they would have to be pilots.

Q. Well, in any event, they would both have to have certain special knowledge, is that correct? A. That is right.

Q. What kind of special knowledge? A. They would have to have had experience at least and schooling, in that they would have to know what indications they should expect.

Q. Is it mandatory that there be two such persons, two such pilots to perform—two such persons to perform a functional check flight, or can it be performed by one person alone? A. I believe the Technical Order says minimum crew in all cases, this to me indicates it is a local interpretation, the maintenance officer of the particular unit would have to determine what he considers minimum crew. I would say that two people is a minimum crew in a T-33A.

Q. There was a passenger accompanying you on the flight which you made on May 20, 1958, was there not? A. That is correct.

142 Q. His name was Chalmers? A. Right.

Q. Did he have any previous flying experience? A. To my knowledge, he had none.

Q. Was he experienced in things which a person should know to perform a functional check flight as you just described? A. To my knowledge, he was not experienced, no.

Q. Now, when a functional check flight is performed, are there any rules or regulations which require that it be performed in a specific area, that is to say, a functional check flight to be performed by the 104th Fighter Interceptor Squadron to which you were assigned at that time? A. I believe there is a local SOP that requires that the functional check flights be performed in an area that is defined by the local Commander.

Mr. Pettibone: I would like to request that this document be marked Defendant's Exhibit No. 3 for identification.

The Clerk: Defendant's Exhibit No. 3 for identification.

(Standing Operating Procedure No. 3, dated 2 January 1957, was marked Defendant's Exhibit No. 3 for identification.)

143 By Mr. Pettibone:

Q. Captain McCoy, I hand you a document which has been marked Defendant's Exhibit 3 for identification. Would you look at it and tell us what it is, if you know? A. This is a reproduction, apparently, of a Standing Operating Procedure.

The Court: Keep your voice up, please.

The Witness: Yes, ma'am. This is a reproduction, apparently, of a Standing Operating Procedure issued by the Operations Officer of the 104th Fighter Squadron, defining certain local flying areas; however, it is not signed by the Operations Officer, not by ours, anyway.

By Mr. Pettibone:

Q. Well, was this Standing Operating Procedure in effect in your unit, the 104th Fighter Interceptor Squadron on May 20, 1958? A. I didn't read the detail, but it appears to be one in effect at that time.

Q. Please read it in detail and let us know if that was in effect, to the best of your recollection, on May 20, 1958. A. Near as I can recall, this appears to be the one that was in effect.

Mr. Pettibone: The defendant offers in evidence the document which has just been identified by the wit-
144 ness, Defendant's Exhibit No. 3, I believe.

The Court: Admitted.

(Defendant's Exhibit No. 3 was received in evidence.)

The Court: At this time, we will recess until 1:45 p.m.

(Whereupon, at 12:30 the luncheon recess was taken pursuant to reconvening at 1:45 p.m., of the same day.)

145 AFTERNOON SESSION

(The proceedings resumed at 1:45 p.m.)

THE COURT: Go ahead, Mr. Pettibone.

Thereupon,

Captain Julius R. McCoy

resumed the stand and testified further as follows:

CROSS-EXAMINATION—(Resumed).

By MR. PETTIBONE:

Q. Captain McCoy, referring to Defendant's Exhibit No. 3, is the term "Engineering Test Flights" as used in paragraph 5 thereof, the same term that you employed in an answer to one of my questions in which you referred to a functional check flight? Are these terms synonymous, in other words? A. They are, sir.

Q. And were you performing such a flight, that is to say, a functional check flight or engineering test flight on May 20, 1958, when this accident happened? A. I was not.

Q. As a matter of fact, a functional check flight or engineering test flight would have to be made in a specified area, would it not? A. That is correct.

Q. Actually, the flight which you performed on May 20, 1958, during the course of which the accident occurred, was in a different area from that, was it not? A. It was within the confines of the local area, there may have been an overlap.

146

Q. There may have been some overlap but it exceeded the confines of the test flight area? A. That is correct.

Q. Incidentally, what is meant by the term local flight area or a local flying area? A. This is an area that is defined by the Commander with certain limitations; in such area you can conduct a flight with an Air Force Form 113 Local Flight Clearance, no authority from Flight Service or now FAA is required in VFR weather.

Q. Was the flight you performed on May 20, 1958, confined within that local flying area? A. It was.

Q. When did you first make plans for the flight which you made on May 20, 1958? A. It was on Saturday prior to this particular day.

Q. And the flight itself was on a Tuesday, is that correct? A. That is correct.

Q. And did you discuss the plans for your flight with anyone on Saturday preceding? A. Col. Kilkowski.

147 Q. And did you tell him that you wished to make a flight on Tuesday, May 20th? A. It was tentative that I would make a flight Tuesday, May 20th, yes.

Q. And what reason did you give for wishing to make this flight on that date? A. The purpose of the flight was a proficiency flight; however, in this particular case, since I had hoped to take a passenger, I got direct approval from Col. Kilkowski.

Q. Who was the passenger that you intended to take? A. Donald Chalmers.

Q. Did Col. Kilkowski ask you your reason for wishing to take Donald Chalmers on this flight? A. He probably did; when I expressed a desire to take the passenger, I probably discussed it with him.

Q. Now, on the day of the flight itself, did you obtain a flight clearance? A. I filed an Air Force Form 113 in the operations office at the 104th Fighter Squadron.

Q. Yes, that is already in evidence, I believe, as Plaintiff's Exhibit No. 1. Let me show you Plaintiff's Exhibit No. 1. Is that the flight clearance which you just referred to? A. This is a reproduction of that clearance, yes.

148 Q. Now, starting near the top of this, first of all, at the top it says "Local Flight Clearance," then near the top on the lefthand side, someone has written "T-33." What does that stand for? A. That is in the block titled "Type Aircraft" and it represents the type of aircraft that made the flight.

Q. Incidentally, who filled out this form, did you fill it

out? A. With the exception of the actual departure time, all the entries on the form are mine.

Q. In your handwriting? A. Yes.

Q. All right. Now, the next thing after T-33, I see a number, 35966. What does that mean? A. That is the last five digits of the aircraft serial number.

Q. The actual aircraft which you flew on this flight, is that it? A. That is correct.

Q. All right. In the next block to the right, where it says "Mission," you have written the letter or numeral "O." What does that stand for? A. That is the Mission type symbol.

Q. What does that stand for? A. That would be a proficiency or operational mission, as opposed to "X-3" for functional check flight, "A" for administrative
149 flights, et cetera.

Q. All right. Now, on the next line below, there appears in the first block the letter "P". That is followed by your name. What does the letter "P" stand for? A. It is a symbol for pilot, duty symbol for pilot.

Q. That is followed by an abbreviation for captain, that would refer to your rank, would it? A. That is correct.

Q. The next would be your serial number, AO and the rest of those numbers? A. That is correct.

Q. What does this mean where it says "Home Station," something written there? A. MTP, that is the designator for the Martin Airport.

Q. All right. Now, on the next line following this, I see the letter "X" which you have written under "P." What does that stand for? A. That is a non-crew member status.

Q. And you have written his name, Chalmers, D. A., after that? A. That is correct.

Q. And of course, that is "PFC," what does that refer to? A. That is his rank.

Q. What is the number that follows that? A. That
150 is his serial number.

Q. That would be his serial number in the Army National Guard? A. That is correct.

Q. All right. And where you have written Pikesville, Maryland, that is his residence address? A. That is the Armory that he is attached to.

Q. All right, fine. Now, near the middle, I see the number which appears to be 1000. Could you explain what that is? A. That is the military way of expressing the time of day. That would be 10 o'clock in the morning.

Q. Ten o'clock standard time or were you on daylight time? A. We were on daylight time, but I believe this is written standard time.

Q. That refers to 10 o'clock standard time? A. That is correct.

Q. Was that the time of day when you intended to commence this flight? A. That is correct.

Q. What time of day did you fill out this form, would you say? A. This is approximately 30 minutes before the flight.

Q. That would have been— A. Thirty to forty 151 minutes.

Q. Roughly 9:30 a.m., standard time, on the morning of the flight? A. That is correct.

Q. All right. Now, the next numbers which you have written in there, will you identify them, just read that column across and tell us what all those different marks on there mean, which you have made? A. The first block "ETD" estimated time of departure, 1000 hours. The next block is "ETA," that is estimated time of arrival and this has been changed or was changed probably at that time to mean ETE, or estimated time en route, so the symbol is 1 plus 00, meaning the number of hours the aircraft would be airborne. The next block is hours of fuel, numbers 1 plus 30, an hour and a half of fuel.

Q. Does that mean you had enough fuel on the plane to cover a flight an hour and a half in duration? A. Yes.

Q. Continue. A. The next block is "Auxiliary Base of 1st Intended Landing," this would not apply since the

aircraft was not intending to land at an auxiliary base. The next block is "Form 'F' Filed At," this has the symbols "NR," meaning not required. And the next block is "Date Filed," referring to the Form F, this also is not required. The next block that I filled in is "Clear-
152 ance Authority," it has my name, and the next block over has "Pilot's Signature," that is my name again. The next block is——

Q. Excuse me, you mean that is your signature? A. My signature, yes.

Q. All right. A. The next block is "Actual Departure," meaning the time and this has a number of 1007, meaning seven minutes after ten in the morning.

Q. You say you did not write that down on there yourself. A. I did not, no.

Q. Who would write that on there, at least if not by name, how would that be done? A. This would be done by one of the operations clerks; after the aircraft had physically left the airfield, he would note the departure time.

Q. He would watch your take-off and check the time and enter it? A. He would probably get the information from the tower through a phone.

Q. I see. Did you have authority to execute your own—approve your own clearance, your own flight clearance? A. I did, yes.

Q. How did you come to have that authority, what
153 was the procedure which gave you that authority?

A. I was one of the pilot officers that had the additional duty of being an operations officer during non-workday flying hours; consequently, the Commander designated me as a clearing authority because I had to brief other pilots and clear their flights.

Q. Were there other officers besides yourself who were authorized to execute clearances, including their own flight clearances? A. There were.

Q. About how many were so authorized, if you remember? A. All officers that had the rating of senior pilot were authorized by virtue of having that rating. I am not aware

just exactly what the number was and I don't know how many other people were in my category that the Commander had authorized.

Q. Did you actually have any discussion with Col. Kilkowski that morning before you took off on this particular flight? A. I did, yes.

Q. About what time was that? A. I would imagine about 9 o'clock in the morning.

Q. That would be 9 o'clock standard time? A. That would be daylight saving time.

Q. That would be about two hours before you
154 actually took off, then, roughly? A. Let me get the time straight.

Q. Well, the form shows, I believe, that you took off at 1007 standard, that would be 1107 daylight time, would it not? A. That is correct.

Q. And if you had this conversation around 9 o'clock with Col. Kilkowski, that would be about two hours before you took off? A. That sounds about right.

Q. Is that right? A. Well——

Q. Just what did you discuss with him on that occasion? A. I reassured myself that I had the clearance to take the passenger on the flight, by contacting him again.

Q. Let me now show you Plaintiff's Exhibit No. 2. Now, in the first line of the text, this is Flight Order No. 105, and in the first line of the text there are some abbreviations. Can you translate those abbreviations into English for us? I take it those are military symbols and military abbreviations which have some particular military meaning. Would you tell us what they are? A. The following crew members, I think this is, this Headquarters.

Q. The CR/M stands for crew members, all right.
155 A. This Headquarters will proceed.

Q. That is WP? A. That is correct, on-slash-about 20 May 1958 in aircraft as indicated below from Martin Airport, Baltimore, Maryland, to destination specified below.

Q. Now, we have the letters "CIPAP," what do they stand for? A. I don't really know.

Q. All right, continue on. A. For purpose of maintaining flying proficiency and upon completion of flight, will return to proper duty station on-slash-about 20 May 1958.

Q. All right. Now, what is this A/C type, does that refer to the type of aircraft? A. Aircraft type and number.

Q. It indicates T-33A, is that right? A. That is correct.

Q. With the number of it, and then follows Captain and your name, J. R. McCoy, is that right? A. Yes.

Q. And your serial number? A. That is right.

Q. Now, Destination Local, what does that mean? A. That means that the flight will be conducted on a local flight clearance and will return to the home station of the
156 aircraft.

Q. That would be Martin Airport? A. That is correct.

Q. And then the next block provides "Duty," and it has the symbol "P," what does that stand for? A. Pilot.

Q. Now, there is another line filled out on this order relating to—this is another flight? A. Another flight, another aircraft.

Q. Nothing to do with you or your flight in this aircraft? A. None at all.

Q. Is it customary to put two or more flights on the same order, is this the usual procedure to do this? A. I believe so, they have several lines.

Q. Down at the bottom here, it says "By Order of the Commander." Who would the Commander be? A. That would be the squadron Commander.

Q. Would that be Col. Kilkowski in this case? A. That would be, yes.

Q. And then follows the word "Official," and it appears to be signed by Joseph J. Maisch, Jr., Major, Maryland Air National Guard, Operations Officer. Was he the operations officer on that day? A. I assume he was.

157 Q. I see. Are there regulations that require that you brief a passenger before he can accompany you

on a flight of the nature you made on May 20, 1958? A. I am not too sure of the regulations; however, it is a local policy and in this case was accomplished.

Q. I see. Did you brief your passenger, then, in accordance with that local policy? A. Yes, I did.

Q. About how long did that take? A. There are two portions to the briefing, one was in the use of equipment such as parachutes and survival or escape procedures from the aircraft, ejection procedures, and the other was general briefing on the aircraft and at the aircraft on various items within the aircraft and the two, totally, took about 40 minutes.

Q. What was your purpose for taking this passenger with you on that date? A. As I have previously stated, I had known him for some time and I had talked to him on some occasions, he had expressed an interest in the Air National Guard and the space was available, regulations were complied with, I felt that he might be interested in joining the unit and possibly with the thought of going to flying school.

Q. Now, the flight which you made on May 20, 1958, was in a T-33A type airplane, is that correct? A. That 158 is correct.

Q. And the number of the plane was 53-5966, do you remember, is that correct? A. That is correct.

Q. And when did you select that particular airplane for this flight? A. The morning of the flight.

Q. How long before the flight? A. Some time in the morning, possibly around 9 o'clock or shortly before.

Q. Why did you select that particular airplane? A. Well, we had two T-33's and the other one was scheduled to go on a flight on the same morning.

Q. So, by elimination, you took the one that was left? A. Probably by mutual agreement with the pilot of the other aircraft.

Q. Did you inspect the plane which you used, before you took off in it? A. I did, yes.

Q. I believe the term is "check it," is that right? A. That is referred to as a walk around inspection.

Q. A walk around inspection, what does that involve? A. That involves making a visual inspection of the aircraft, check for worn tires, fluid leaks, proper air pressures, certain ground safety pins removed, panels are secure,
159 things like ball cap being secured.

Q. Did you make that inspection of this plane? A. I did, yes.

Q. Did you find anything wrong with the plane? A. I did not.

Q. Was it in good condition, the best of your knowledge? A. Visual inspection showed the plane to be in good condition.

Q. Before you actually took off, did you warm up the plane and try the motors and that sort of thing? A. Yes, there is a regular procedure.

Q. There is a regular procedure, did you follow the regular procedure? A. Yes.

Q. Did the plane function properly? A. It did.

Q. Did there appear to be anything wrong with it, defects in it, or any mechanical malfunctions of any kind? A. No, sir, there did not.

Q. After you took off in that plane on May 20, 1958, did you at any time during the course of your flight, up to the time of the collision, of course, notice any malfunctions or defects of any kind in the plane? A. I did not.

Q. Did it perform properly in every proper way?
160 A. Yes, sir.

Q. Had you flown this particular plane before? A. Yes, I had.

Q. Do you remember when was the last time you had flown it before May 20, 1958? A. I don't recall exactly, I had flown another T-33 a few days just prior to the accident.

Q. Do you remember whether there were any markings or symbols marked on the plane when you flew on May 20, 1958? A. Whether there were any symbols or markings?

Q. Yes. A. Of course, the aircraft number was on it, certain other instructions such as electrical power connection points, engine access doors, that sort of stenciling was on the aircraft, and the letters, either MIDANG or MDAFNG, it was just during a period when we were changing the markings from one symbol to another.

MR. PETTIBONE: May I ask that this be marked?

THE CLERK: Defendant's Exhibit No. 4.

MR. PETTIBONE: Defendant's Exhibit No. 4 for identification.

(Standing Operating Procedure No. 9, dated 16 January 1957, was marked Defendant's Exhibit No. 4 for identification.)

161 By MR. PETTIBONE:

Q. Captain McCoy, I hand you Defendant's Exhibit No. 4 for identification and ask you to state what it is, if you know? A. This appears to be a reproduction of the Standing Operating Procedure issued by the operations officer, 104th Fighter Interceptor Squadron; however, it doesn't bear his signature. Apparently, it was in effect on May 20, 1958.

MR. PETTIBONE: Thank you. I wish to offer in evidence the document which has just been identified by the witness.

THE COURT: Admitted.

(Defendant's Exhibit No. 4 was received in evidence.)

MR. PETTIBONE: I would like to have this document marked for identification.

THE CLERK: Defendant's Exhibit No. 5 for identification.

(Standing Operating Procedure No. 18, dated 25 January 1957, was marked Defendant's Exhibit No. 5 for identification.)

By MR. PETTIBONE:

Q. Captain McCoy, I hand you a document which has been marked Defendant's Exhibit No. 5 for identification.

162 Will you look at it and tell us what it is, if you know?

A. This appears to be a Standing Operating Procedure, a reproduction of a Standing Operating Procedure from the office of operations officer, 104th Fighter Interceptor Squadron.

Q. Do you know whether it was in effect or not on May 20, 1958? A. I would believe it was, yes.

MR. PETTIBONE: The Court please, I wish to offer in evidence the document which has just been identified by the witness.

THE COURT: Admitted.

(Defendant's Exhibit No. 5 was received in evidence.)

By MR. PETTIBONE:

Q. Captain McCoy, let me refer to some questions and answers which you made at the time your deposition was taken. At page 477, you were asked the following questions:

"Question. During proficiency flight as a maintenance chief would you automatically note its function and check its efficiency insofar as the performance of the aircraft is concerned?

"Answer. I would not be on a flight in duty as a maintenance chief. I would be on the flight in my duty as a captain in the Air National Guard on
163 flying status and qualified to check aircraft. However, I may be holding the job description as an air technician, as an aircraft maintenance chief simultaneously.

"Question. So that automatically you would do both, wouldn't you?

"Answer. I don't quite like the word 'automatically'.

"Question. Well, normally. In other words, when you are in the airplane you are really functioning in both capacities?

"Answer. It is my belief that as an air technician when I get in an airplane I become a Captain in the Air National Guard, or I am a Captain in the Air National Guard qualified by the Department of the Air Force and its regulations to operate the aircraft, but I still have the responsibility as an aircraft maintenance chief to evaluate the condition of the aircraft."

Were the answers which you gave to those questions true, do you affirm those answers to those questions here? A. The best of my belief, yes.

Q. Now, did you continue to have a rating as a flying officer after May 20, 1958, up to the present time? A. I retain a rating at this moment, Mr. Pettibone.

164 Q. Have you performed any aerial flights since May 20, 1958? A. I have not.

Q. Well, in order to maintain the rating, aren't you required to make a certain number of proficiency flights? A. No, sir.

Q. Well, have you been on flying status since May 20, 1958? A. I have not.

Q. When did you go off flying status? A. Well, originally I went off flying status immediately after the accident due to injuries.

Q. Pardon? A. Due to injuries, I was initially taken off flying status for being physically incapable of flying, then I requested suspension from flying status at some later date, I don't recall the exact date.

Q. Approximately how long after the accident did you request that you be relieved of flying status? A. I think it was probably about six months after the accident.

Q. And have you been off flying status, then, at all times since then to the present moment? A. I have, yes.

Q. Are you still employed as aircraft maintenance chief? A. I am, yes.

165 Q. Have you held that position since the date of the accident on May 20, 1958? A. Yes, sir.

MR. PETTIBONE: May I ask the Court's indulgence for one minute?

THE COURT: Certainly.

By MR. PETTIBONE:

Q. How long a flight did you plan to make on May 20, 1958? A. One hour.

Q. And approximately where did you intend to go on that flight? A. I intended to follow the route of the flight up to and until the time of the accident; had there been no accident, I would have proceeded back to Baltimore.

Q. Were you on your way back to Martin Airport at the time the accident occurred? A. Yes.

Q. And how far out had you gone from Martin Airport before you turned back? A. The furthest point?

Q. Yes. A. Harper's Ferry, West Virginia.

Q. Now, what activity did you engage in during
166 the course of this flight from the time you took off until the time the accident occurred, what were you doing? A. By activity, I can't quite follow you. I was engaged in flying the aircraft, for one thing.

Q. You had a passenger with you, were you talking to him? A. Yes, from time to time.

Q. And what was he doing? A. I don't know, you can't see the passenger in the rear seat from the front seat.

Q. Do you know whether or not he had a camera with him? A. He had a camera with him, yes.

Q. Do you know whether or not he took any pictures? A. I have no idea.

Q. Did you have any conversation with him during the flight? A. Yes.

Q. What was the conversation about? A. I pointed out various landmarks to him.

Q. Such as? A. Well, one, Friendship Airport, City of Washington, Leesburg, Virginia, the Potomac River, the Chesapeake Bay, Harper's Ferry, general conversation.

Q. Did you notice whether or not he used the camera at

any time? A. I couldn't tell, I don't know for sure,
167 because you can't see the passenger.

Q. Did you watch the instruments on the plane? A. From time to time, yes.

Q. Did the instruments indicate that the plane was behaving properly, performing satisfactorily and without mechanical troubles or difficulties of any kind? A. They did.

MR. PETTIBONE: No more questions, Your Honor.

REDIRECT EXAMINATION.

By MR. GALIHER:

Q. Did you check during the course of the flight the efficiency of the equipment in order to determine if it was working properly, the plane was flying properly? A. Yes, all the equipment on the aircraft that I had reason to check, functioned properly.

Q. During the average week, how many men were there at the base on the weekdays flying the planes, Captain? A. We had six or seven flying officers full time and then we might have in the evenings possibly 10 or 12 part-time pilots; when I say part time, they had some full-time job other than with the Air National Guard, and then we might have one, two, or three of these so-called part-time people during the day, during the week.

Q. Did you get any extra flight pay for this partic-
168 ular flight? A. I think I can answer that by saying there is no way to know what portion of the flying time is the part that qualifies you for flight pay, there is a certain minimum amount established and all over that would contribute or might not contribute.

Q. Well, you had, up to the day of the accident, more than the needed flight time for that particular period, did you not? A. Yes.

Q. Did you do the principal flying to check maintenance of the planes at that base? A. I probably flew far more functional check flights than anybody else on the base, yes.

Q. Did you have the authority to issue the flight clearance you have spoken of? A. Yes.

Q. You have previously testified on page 120 as follows:

"Question. And that was the purpose of the particular flight at the time of this unfortunate accident?

"Answer. I made numerous flights with the idea in mind to increase my proficiency and to analyze the the quality of the product. This particular

169 flight——

"Question. You include that?

"Answer. This particular flight was a part of my function to maintain proficiency and maintain the equipment."

Did you so testify? A. I believe I did.

Q. And is that correct? A. Yes.

MR. GALIHER: Thank you very much, Captain.

MR. PETTIBONE: No further questions by the defendant, Your Honor.

THE COURT: You may step down.

MR. GALIHER: Thank you very much, Captain McCoy.

(Witness excused.)

MR. PETTIBONE: Before the next witness, I would like to make a request. During the course of his testimony, Captain McCoy testified to certain records, apparently his personal records which he brought with him. We would like the opportunity of examining those records which we have not, so far as we know, seen heretofore. We also would like the privilege of recalling him at some later time in this trial, if necessary, by virtue of anything we find in those records.

THE COURT: Captain, do you have the records with you?

170 CAPTAIN MCCOY: Yes, I do.

THE COURT: Would you like to give them to the Clerk here and let her give you a receipt for them.

(The records were given to the Clerk.)

Thereupon,

Lieutenant Colonel Victor F. Kilkowski

called as a witness by the plaintiff, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By MR. GALIHER:

Q. Colonel, what is your full name, address and occupation? A. Lt. Col. Victor F. Kilkowski, 1611 Ingram Road, Baltimore 12, Maryland.

Q. What is your occupation at the present time? A. At present, employed as Base Detachment Commander of all units of the Maryland Air National Guard based at Martin Airport.

Q. Now, do you have both a military and a civilian status? A. I have at the present time both a military and a civilian status.

Q. Did you in May of 1958, specifically May 20, 1958? A. Yes, I did on May 20, 1958.

Q. And what was your military status at that time? A. I was Commander of the 104th Fighter Interceptor Squadron and Base Detachment Commander of Martin Airport at the present time.

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THE COURT: What was the first?

THE WITNESS: Commander of the 104th Fighter Interceptor Squadron of the Maryland Air National Guard.

THE COURT: Thank you.

By MR. GALIHER:

Q. And you told us that also you had a status of Base Detachment Commander? A. Base Detachment Commander, Martin Airport.

Q. Was that a civilian status? A. That was as an air technician.

Q. Now, I have here Plaintiff's Exhibit No. 3, Air National Guard Manual, captioned "Civilian Personnel

Manual." I would like to refer you to page 23 and ask you to look at it and tell me if that was the job description of your civilian job as air technician in the month of May, and specifically May 20, 1958? A. Yes, it is.

MR. GALIHER: Your Honor, you have seen the other two job descriptions of the maintenance supervisor and the aircraft maintenance chief. May I hand this up to Your Honor? I would like to introduce this into evidence.

THE COURT: Well, now, this that you are offering
172 consists of three pages, does it not, 23, 24 and 25?

MR. GALIHER: Yes, ma'am.

THE COURT: All right, admitted.

(Pages 23, 24 and 25 of Plaintiff's Exhibit No. 3, were received in evidence.)

MR. GALIHER: May I confer with counsel for a minute?

THE COURT: Yes, you may.

By MR. GALIHER:

Q. As Base Detachment Commander, Col. Kilkowski, will you tell us what personnel was under your command or control? A. Are you speaking of it at the time of the accident?

Q. Yes, sir. A. We had approximately 120 employees at the base, in various areas, supply, maintenance, administration and personnel, operations, fiscal, and——

Q. Were these civilians that you are now talking about? A. They are all air technicians.

Q. Air technicians? A. Yes, broken down into officer, Air category, type position, generally the head supervisors are officer type except for certain sections.

Q. What were the duties of these persons that you
173 have just referred to? A. Our duty was to provide the continuity during the week of plans and programs of the units, basically we were chiefly responsible for doing all those things that the units could not do in their military status, such as maintain the aircraft; the units met for four periods a month, naturally they could

not maintain the aircraft nor could they maintain all the records associated with the military, so our position at the base was to continue this in accordance with the regulations, providing administrative and maintenance services.

Q. Were some of these persons clerks? A. Some of them were clerks, yes.

Q. Some of them had the duty and obligation of watching over and taking care of the aircraft at the base? A. Not watching over as such, but caring for the maintenance, making sure that they were in commission, maintained properly, inspected.

Q. Was there a document issued by the National Guard, Department of the Air Force, with respect to the civilian personnel that you have just described at the base? A. Yes, there is a numbered document that comes from the National Guard Bureau to the State, which authorizes positions by grade, position named; they conform to the titles and general description of the positions in the Manual that you have just shown me. When we receive this
174 document, the State then is authorized to hire against this manning document with the grades that have been authorized, and would, according to pay scales that have been set by the Government.

Q. Do you mean the United States Government? A. The United States Government sets the maximums that can be paid for NGC or Wage Labor Board employees. We go by the rules of the Air Force, Army Wage Labor Board rules for the NGW employees, as they are called now; I think they were referred to as NGM's at the time of the accident.

Q. When you refer to Air Force, do you mean United States Air Force? A. Yes.

Q. Did the appropriation or funds for your unit have any particular number at your base in May of 1958? A. The appropriations for our base contained various number designations, all money that is allocated to the base is allocated by project number to the State through the

United States Property and Fiscal Officer. The pay for air technicians falls under project 448 fund.

Q. Who was the United States Property and Fiscal Officer for the State of Maryland in May of 1958? A. Lt. Col. Irvin E. Ebaugh.

Q. And did you indicate, a minute or so ago, that all moneys that came to the personnel at your base,
175 civilian personnel, came through his hands? A. The United States Property and Fiscal Officer receives the budget authority and allocation from the National Guard Bureau. This is suballocated to the base, to the assistant USP&FO, who is located at the base, and through this method the funds are certified.

Q. Did you also have a military status in May of 1958, as distinguished from a civilian status, Colonel? A. Yes, as I said, I was Commander of the 104th Fighter Interceptor Squadron.

Q. What was your rank in May of 1958? A. I can't remember whether it was Major or Lieutenant Colonel, right at the present time, I think it was Major.

Q. How is your salary paid in both your civilian and military status? A. Salaries were paid in two different manners, in the civilian status, we certified to the time and attendance of the employees, the checks are made out or the payroll was made out based on the wage scale of each employee. And this is sent to Bolling Air Force Base, which has the obligation of providing financial service for our base; the checks are made out to the individuals and returned to the base and we distribute them.

Q. Was Bolling Air Field a United States Air
176 Force Base? A. Yes.

Q. Pardon me? A. You asked two questions, the second on the military line. People attended the various scheduled training assemblies and were marked, in accordance with their status, present or whatever the case may be, or absent, this status then is checked by the Air Force Adviser, it is one of his duties, the payroll is made up and sent to, I think at that time it was Clinton County

Air Force Base in Ohio, and the check would be issued on a quarterly basis and returned to the Commander of the unit for distribution to the members of his unit.

Q. The civilian air technicians, as I understand, would be paid by United States Treasury Department check issued from Bolling Field Air Force Base? A. Both the checks are drawn on the United States Treasury.

Q. But the checks for the civilian personnel air technicians would come from Bolling Air Force? A. Yes.

Q. Will you state whether or not you had a commission in the Air National Guard of the United States? A. I am commissioned as an officer in the Air National Guard.

Q. Now, with respect to the document that you
177 have referred to as the manning document, will you state whether or not from time to time there were changes in that document? A. Yes, the document is constantly being revised. I have been Base Detachment Commander since 1956 and it has undergone many revisions. They might change one or two positions, they might change the grade, and in some cases they have overall revisions such as we received just early in 1958.

Q. Who would make those revisions, Colonel? A. I don't know the internal process, but I think it is done by the Air Technician Section of the National Guard Bureau, which recommends these changes to the Chief National Guard Bureau.

Q. In the Pentagon? A. In the Pentagon, yes.

Q. What about the uniforms that were worn at the base, Colonel, were they the same type of uniform worn by the United States Air Force? A. Yes.

Q. And will you state if there was a regulation which prescribed that an air technician should wear a uniform? A. Well, I could not state definitely what the regulation was at that time. I know that in the State of Maryland, we have worn the comparable military uniform since the origin of the unit in 1946, and I say the matter has
178 been a subject for discussion, I understand it is authorized now that the Adjutant General so indicates

that he wants it worn. But at the time, in fact in the entire history of the Maryland Air National Guard, we have worn the uniform at the base because of our association with transient maintenance service and other personnel on the military.

Q. What were the job and hourly requirements of the civilian employees at the base, the air technicians? A. The air technicians are scheduled for a 40-hour work week and this 40-hour work week is normally obtained Tuesday through Saturday. However, there are other periods when we have to support operations other than during this particular 40-hour period; for instance, we have to support and maintain flying operations on a Sunday and three evenings per week, Tuesday, Wednesday and Thursday, and in some occasions on Mondays, so that the work week is beyond the 40-hour work week. So we have to displace some of the schedules so that we can support this, we would displace six people to support evening flying, maybe a group of 10 or so to support Sunday flying, depending on the workload.

Q. Are you talking about persons in a civilian status or both civilian and military? A. This is civilian status only.

Q. Now, was your 104th Squadron also authorized to participate in certain training which was to be sup-
179 ported by Federal funds? A. All of our training schedules, inactive duty training and active duty for training, are supported by Federal funds.

Q. How many training periods were you required to pursue a year? A. There are two different categories in pursuit of training, the non-flying personnel attend 48 four-hour periods per year. In addition to that, they attend 15 days of field training per year. Now, flying personnel who are authorized by virtue of their rating, flying status, to fly, are authorized for 36 additional flying training periods in order to meet a portion of that requirement.

Q. Authorized by whom, Col. Kilkowski? A. Well, the basic authority comes from the National Guard Bureau,

and the schedules and what-not, are matters of State control.

Q. State whether or not there was an additional field training period of 15 days. A. I believe I did state there is a 15-day field training period.

Q. Will you state whether you received additional compensation for the military duties which you performed, separate and apart from your air technician duties? A. Yes, the two pays are completely separate and dis-

180 tinct.

Q. And was the rate of pay in the military status comparable to the same rate of pay of persons who might be with the Air National Guard Bureau or with the United States Air Force? A. You participate in your military rank, you receive the pay comparable to that of your rank plus longevity increases and plus whatever other additional benefits you might qualify for, such as flying pay.

Q. Did you qualify for flight pay? A. Yes, sir.

Q. And what was the basis of compensation of the flight pay and who prescribed the basis for the amount of the payment? A. Well, the basis for the amount of the flight pay is based on the Air Force rates of pay for the comparable ranks. Now, qualification for flight pay in the case of a Reservist is so many hours for a month's period, two hours, I think it is, six hours and a quarter.

Q. Who sets those standards, Col. Kilkowski? A. I would have to check to find out exactly where the two-hour standard is set, I think it is in a Department of Defense order.

Q. In your deposition, if I may refer to it, you stated, you were asked this question:

181 "Question. And you say standard provision for flight pay. Is that found in the regulations, and if so, what regulation?

"Answer. It is found in the regulation concerning finances. The best that I can explain it is that the

pay is based, your base pay, is based on standards set by the Government. You are entitled to——

"Question. Is that the U.S. Government, the United States Government?

"Answer. The United States Air Force.

"Question. The United States Air Force. Thank you.

"Answer. The base pay is set, and the Air National Guard are also qualified for longevity increases, and they are qualified for flight duty pay, or flight hazard pay. They are also entitled to it."

And you go on and explain further. Does that refresh your recollection? A. It is true, I thought you asked me what the authority for it was. It is broken down into pay regulations.

Q. Perhaps my question was confusing, for which I apologize.

THE COURT: At this time, we will take a recess of
182 five minutes.

(A short recess was taken.)

MR. PETTIBONE: Might I inquire of the Court at this time, I am wondering whether I could call for the witness which I plan to present at the beginning of defendant's case. I have the witness on telephone call and he can get here on about 30 minutes' notice and I would like to know whether it is necessary that I should send for the witness at this time or not.

THE COURT: How long do you anticipate your direct examination will be of this witness, Mr. Galiher?

MR. GALIHER: I would say approximately 20 to 25 minutes.

THE COURT: How long do you anticipate that your cross-examination would be, Mr. Pettibone?

MR. PETTIBONE: I should think a similar length of time.

MR. GALIHER: We also have a deposition we want to bring to Your Honor's attention, too, anyway.

THE COURT: Well, I would say have him ready for the first thing in the morning.

MR. PETTIBONE: Thank you, Your Honor.

By MR. GALIHER:

Q. Were you also qualified for longevity increases under regulations prescribed by the National Guard Bu-
183 reau? A. Yes, sir.

Q. What regulations govern the flight of a T-33 taking off under local flight clearance VFR from Martin Field? A. Many regulations but the basic flying regulation is Air Force Regulation 60-16.

Q. Can you tell us how many components the Reserve of the United States Air Force has? A. I am familiar with two basic components in the Reserve of the Air Force, namely, the Air Force Reserve and the Air National Guard of the United States.

Q. Is the latter also referred to as the Ready Reserve Component of the Air Force? A. The Air National Guard is a ready component of the United States Air Force.

Q. When you receive orders and regulations from the National Guard Bureau, can you tell us under whose authority they are issued? A. Regulations come to us from the National Guard Bureau through the State Adjutant General and to us. They bear the order signature of the Secretary of the Air Force and the heading, "Department of the Air Force."

Q. Would such orders as you have just indicated, take precedence over any local procedures that you might direct, or your superior might direct to be followed?
184 A. The Air Force and Air National Guard regulations are the basic regulations and would take precedence except where there might be orders from higher up to the contrary.

Q. There has been some testimony here, when Captain McCoy was on the stand, concerning Standing Operating Procedures, SOP's. A. Yes.

Q. What originally is the basis for the SOP's being issued? A. Well, regulations are broad in scope and cannot be made to apply to each locality, since they are general regulations which apply to all localities. So at base level and at squadron level, we put out what are known as Standing Operating Procedures which applied to our particular locality and put those regulations into force, in some cases augment them.

Q. Well, are these necessary as the result of directives that you receive from the United States Air Force? A. I couldn't be sure about that. I know that Federal inspectors insist that we have SOP's and IOP's, which are Internal Operating Procedures. I can't right now get the authority for it, right here.

Q. And when you say Federal, what department do you have reference to? A. Well, the United States Air
185 Force has the obligation to inspect Air National Guard units at least once yearly, and the Federal inspectors come into our base and inspect our units. It is the time of the year when we find out whether we are doing things right or wrong, they tell us so.

Q. What was Captain McCoy's status at your base prior to May 16, 1958? A. Captain McCoy was employed as the base maintenance supervisor.

Q. Was that his civilian status of air technician? A. It is an air technician status.

Q. What was his military status at that time? A. He was the aircraft maintenance officer of the 104th Squadron.

Q. As of May 16, 1958, was there a change in status, civilian? A. Yes, there was a change in status and to clarify, the aircraft maintenance chief position was created early in 1958, assigned to us on a manning document.

Q. From whom? A. From the National Guard Bureau. We felt that we needed more supervision and maintenance because of the large number of people that had to be supervised and steps were taken to procure the services of Major Mitchell, who was undergoing the training instruction at

the aircraft maintenance officer course at Chanute
186 Air Force Base. He was to return to the unit as the senior maintenance man. Now, May 16 is just a convenient time to change the manning document, change Captain McCoy's position. He understood fully that he was still to carry out the duties of the aircraft maintenance chief, which is a new position that has been created, and also act in the capacity of maintenance supervisor until Major Mitchell's return.

I think there has been some misunderstanding as to why this change occurred, but it was a new position that was created about that time and which gave us two officers in the aircraft maintenance field rather than the one.

Q. But he remained actually the only officer in the aircraft maintenance field? A. Until Major Mitchell's return, yes.

Q. What were his requirements as acting maintenance supervisor and aircraft maintenance chief at the base during the month of May, including the 16th of May and the 20th of May? A. He had the responsibility for the general supervision of aircraft maintenance, the motor pool, crash fire rescue station, communication section; of course, he had qualified supervisors under him as the head of these sections; also the armament section. In addition to that, he had responsibility for flight testing aircraft, which was a talent that we had that we used.

187 Q. What were evaluation flights of the aircraft? A. I don't understand the term "evaluation flights." There are proficiency flights, flight checks, there are flights which have multi-purpose purposes, such as proficiency as well as evaluation of the maintenance potential.

Q. Would you explain what that one entailed? A. Well, a flight check is designated TO—I think it is—1-1-300.

Q. Is that what is referred to in this document here—is that what you have in mind about flight test area? A. Yes, the flight test area designated for engineering test flights, the name of that changed somewhere back there from test flight to flight check. These flights that would

be confined to this area are those defined by the TO reference to flight testing of aircraft, which I say is the result of all flights, particularly by the engineering officer, a by-product of that flight is the evaluation of the maintenance of the product that he is maintaining. This is a different area than the one described here, completely.

Q. And he would then be permitted to fly around in the local flying area to do that? A. Yes, that is true.

Q. Now, did Captain McCoy's rating in the military also require him to participate in aerial flights? A. Yes, it did.

188 Q. Will you state whether or not any inspection was made of the maintenance section by the United States Air Force, of your maintenance section? A. There is an annual inspection by the United States Air Force, generally conducted by the numbered Air Force, which inspects not only the maintenance section but the entire unit, operations, personnel, supply, as well as maintenance.

Q. What about the aircraft? A. They will take an aircraft, spot check an aircraft, pull a complete maintenance check of it, to insure the standards of maintenance are being maintained. They do this during the course of their inspection.

Q. Does a maintenance person in the status of Captain McCoy, is he also required to maintain liaison with various United States Air Force Depots in connection with his aircraft? A. Yes, that is a requirement.

Q. Is he also required to train his airmen in accordance with Continental Air Command directives? A. At that time, yes, the Continental Air Command had the training responsibility for the Air National Guard; it is changed since then.

Q. But that was true of May 20, 1958, was it? A. Yes.

189 Q. Will you state whether or not the Air Force provided personnel at your base to inspect the various aircraft? A. They didn't provide personnel for the sole purpose of inspecting, they provided an Air Adviser

and two airmen in his section for the unit, one of those was assigned in the maintenance field and, as part of his duties, he did make periodic inspections of our aircraft.

Q. Was that Major Britton? A. Major Britton was the Senior Officer, Sgt. Baldwin was the maintenance airman that was assigned.

Q. Were they United States Air Force personnel? A. Yes.

Q. Can you explain to us how Federal Recognition is achieved by an officer coming into your unit? A. I couldn't explain all the details once it leaves our unit, but there are two categories, one would be an officer applying for admittance to the unit, who has a United States Air Force Reserve commission. His papers would be processed, sent to the National Guard Bureau through our State channels without the need for the Federal Recognition Board to meet locally, and we would receive notice back from the National Guard Bureau that Federal Recognition had been extended or not extended to this individual. If it were extended, we would keep him; if not, we would have
190 to get rid of him.

In the case of an officer who has no commission or an applicant who has no commission, we would have to take the gentleman in, examine him, give him tests, send off for predetermination of grade, this would be sent back to us, and the Federal Recognition papers would go forward and then he would be Federally Recognized by the National Guard Bureau under orders, notification of Federal Recognition would come from the National Guard Bureau. This is a much more involved procedure.

Q. What provisions are made for compensation for injury or death of air technicians injured or killed while in the performance of duties as air technicians? A. They are covered under the Federal Employees Compensation Act, which I understand is administered by the Department of Labor, and in case of permanent injury, they would receive benefits depending upon the amount of disability. In case of death, the survivor would receive benefits based

on status, number of children. In case of non-disabling injury, we are treated at the United States Public Health Service Hospital at Baltimore under the Federal Employees Compensation Act.

Q. What was Captain McCoy's status on the day of the accident up to and including the flight resulting in his accident?

191 MR. PETTIBONE: I object to the form of the question, it calls for a conclusion and is an issue which is before the Court.

MR. GALIHER: This is his Commander, Your Honor, and I submit he would know.

THE COURT: I will overrule the objection.

By MR. GALIHER:

Q. Would you answer that, Colonel, please, sir? A. Captain McCoy's pay status was as an air technician up to the time of the accident, he was active, present for duty. At the time of the accident, he reverts to a sick capacity, which covers both sickness and injury. In the Air National Guard, as air technicians, we accumulate sick leave, and at the time we received notice that he was injured, we changed the document or indicated on the document that he was sick as of that hour, I think it is recorded to the closest hour.

Q. Was he carried in an air technician pay status throughout that day? A. Yes, throughout his normal work period.

Q. And what were the hours of his normal work period? A. Eight to 4:30.

Q. Would the time he spent on this particular flight qualify him for the performance of flying training for the computation of time for military pay purposes? A.

192 Your question is not clear to me. You said for flying training and for military pay purposes– I am sorry.

Q. Suppose I read you the question that was asked when your deposition was taken, page 677:

"Question. Would the time he spent making this particular flight on that morning have qualified him for the performance of a flying training period for the computation of time as part thereof for military pay purposes?"

A. It is clear now. No, it would not qualify him for a flying training period at that time.

Q. Did Captain McCoy at any time after this flight request that the time of the flight be credited to his flight training period for military pay purposes? A. No, he did not.

Q. Will you state whether or not he was paid on that day for services as an air technician only? A. He was paid as an air technician.

Q. Is it true that he was likewise paid by check from Bolling Field, just as you were? A. Yes.

Q. For the civilian work. Will you state whether or not his pay as an air technician continued through the period of time he was disabled following this acci-
193 dent? A. Yes, it did.

Q. Was he, to the best of your knowledge, performing the duties of an air technician on that day until the time of his unfortunate accident? A. Yes.

Q. Do the air technician directives issued by the Air Force, provide that a man may continue to fly while in that status? A. The air technician directives have no bearing on the flying status of an individual. A man cannot be granted flying status by virtue of an air technician position or directive. Flying status is something separate and is issued by the United States Air Force in the form of an aeronautical rating and a flight status which is an order to participate in frequent aerial flights. The two cannot be intermingled.

Q. At the time of the accident, was there a maintenance supervisor assigned to the base other than Captain McCoy? A. Captain McCoy was the only officer maintenance

supervisor. We had other supervision in the airmen category, under Captain McCoy.

Q. Mas Major Mitchell the designated maintenance supervisor at the base? A. Major Mitchell was the officer who was undergoing training at Chanute Air Force Base, who was to come back to the base to be the base maintenance supervisor.

194 Q. Was Captain McCoy instructed to perform the duties of acting maintenance supervisor during the absence of Major Mitchell? A. Yes.

Q. Did the duties of maintenance supervisor also include flying, as a desirable requirement? A. Yes.

Q. Why was it a desirable requirement? A. Desirable in order that he flight check his aircraft, that he be able to better know the aircraft for supervision of maintenance, that he be able to better understand the way his flight line people react when an aircraft is starting up, he is the pilot of the aircraft, are they doing the job properly; I think just the inherent knowledge of flying the aircraft and testing it, would make him a better supervisor.

Q. Do you use a particular form for flight order at your base, regardless of the reason for the flight? A. At the time of 1958, we had a standard form of flight order.

Q. Thank you. Was Captain McCoy under any general requirement to fly? A. Captain McCoy is an officer with an aeronautical rating and with the current flight status, had a requirement to fly to accomplish at least the minimum 60-2 minimums, keep his currency in the aircraft.

195 Q. May I give you the question I gave you when your deposition was taken:

"Question. What I am trying to get at, of course, is this. Did the duties which he was performing as base maintenance supervisor, these being the duties in addition to those which went with his job, his regular job as aircraft maintenance chief, permit or require him to make the aerial flight which he made on that date in a T-33?

"Answer. Again, the question is difficult. If a man has a flying status and is hired in the position where his flying status will enhance his chances to do a good job as an air technician, then he receives general requirement to maintain his proficiency in his capacity. In Captain McCoy's case, he had such flying status, was fulfilling a job whereby his flying status would enhance his job a bit, and therefore received a general requirement to fly."

Is that correct? A. That is correct.

MR. PETTIBONE: If the Court please, there has been a goodly number of leading questions put to this witness which I have not objected to, but I don't know why
196 a leading question of this form should be posed to this witness at this time. He is a witness called by the plaintiff, he is not a hostile witness, certainly the plaintiff has no right to impeach his own witness and I object to the form of the question, which not only supplies the question with matters which constitute evidence and conclusions, but also supplies the answer. I object to this form of procedure with this witness.

THE COURT: I believe that your questions of this witness should not be leading.

MR. GALIHER: Yes, ma'am.

By MR. GALIHER:

Q. Suppose I repeat this question again and get the answer. Will you state whether or not the duties of base maintenance supervisor and the duties of aircraft maintenance chief permitted or required Captain McCoy to make aerial flights? A. Yes, they did.

Q. What was your reason for requiring Captain McCoy to maintain his proficiency or qualifications to fly? A. Captain McCoy has been—at that time, was required to maintain his proficiency to fly for the simple reason he had to flight test aircraft. Now, the nature of a flight test, after an aircraft has undergone quite a bit of mainte-

nance, means that the individual has to be compe-
197 tent, he cannot maintain his competency my merely flying when he has to flight check the aircraft. The period between flight checks might be six months in some cases, so he has to maintain his proficiency, keep it up, in order to do that job. Now, granted there are times when it is not a direct flight check, but the proficiency that he gains from general flight qualifies him to be named as a flight check pilot, in the first place, and to sustain that rating. You are supposed to pick your most qualified people to flight check and to act as instructor pilots and you can't do this without flying.

Q. Will you state whether or not Captain McCoy requested permission from you to make the flight in question on May 20, 1958? A. Well, to clarify, each time a man flies, they do not have to walk into my office and get direct permission to fly. This is a matter of ordinary procedure, they have been granted an order to fly by virtue of their flying status and aeronautical rating, there are procedures set up there by the operaitions officer for them to fly, based on certain requirements, flying hour allocations, and what-not.

This particular case was brought to my attention because it involved a passenger who normally was not a crew member. Now, my interest there was to insure that that passenger was qualified in accordance with regulations
198 to take this flight, by virtue of his Reserve association, he was listed as a qualified man to take the flight. Captain McCoy indicated to me that the man was interested in joining the Air National Guard and perhaps flight training. We had, I think, two vacancies at the time and I concurred in the thing, as a matter of course, to get more people interested in the flying training school.

Q. Were there other reasons for taking this particular flight on this morning in question? A. The general reason for any flight of this nature is proficiency. You don't set up a flight for the express purpose of taking any in-

dividual up, the express purpose for flying is for your own general proficiency. If there is a seat available and the man qualifies in accordance with the regulations, it is permissible to take him up on that flight. The Air Force does it all the time.

Q. Were there other reasons for the flight in question? A. I think as I mentioned before, a third reason for any flight is to insure that the equipment is in proper working order, to—well, as a result of each flight the maintenance officer takes, he has to fill out a form, whether the aircraft was okay, or whether it had even minor discrepancies which would be listed in the form. When he lands and comes back from the flight, this is done; so there is a third reason for the flight, which is to insure the proper maintenance of the equipment which he has general
199 supervision over.

Q. As an aircraft technician? A. As an aircraft maintenance officer in the squadron and also as an air technician.

Q. May I ask you if there would be any other reason, such as checking the efficiency of tower personnel? A. I think I mentioned that before, Mr. Galiher, that there are many things that are associated with flying, obstructions that might be on the runway, exposed lips of runways that might cause accidents, foreign object damage, just a piece of wire on the runway or on the ramp can be pulled into an engine and ruin a $100,000 engine.

So, this gentleman flying can see these things, he can see the cleanliness of his ramp, he can see the condition of his airport, the efficiency of the tower personnel and the way his maintenance people react, are they standing in front of the intake scoop when he parks the aircraft, are they waiting until he stops before they insert the chocks. He gets a better appreciation of the way his people are doing the job, when he flies.

Q. And that was true of the flight in question? A. It is true of all flights that Captain McCoy has taken.

Q. In and around the time of this particular flight, were other air technicians authorized to make flights for these same purposes, particularly, the latter—or the first purpose? A. Yes, we have three air technicians that are assigned to us that not only have a preferred flying status indication in their job description, but they have a mandatory flying status description, for instance, the operations officer, two flying training supervisors. Their jobs are so wrapped up in flying that if they should ever lose their flying status, they lose their jobs.

Q. Are those civilians in that capacity? A. They are air technicians, yes.

Q. Will you state whether or not the air technician, by his flights, is also expected to help bring up the proficiency of other air technicians on the base? A. We have at the base, air technicians who are responsible to lead flights, gunnery missions, bombing missions, rockets, and this air technician can lead a flight where other members of the unit are in the flight, in order to qualify them in combat readiness training.

Q. Was Captain McCoy authorized to make the flight and to fly where he did, on the occasion of May 20, 1958? A. To the best of my knowledge, Captain McCoy operated completely within the regulations and did not violate any.

Mr. Galiher: Will Your Honor excuse me for a moment?

The Court: Certainly.

Mr. Galiher: Would you mark this, if you please.

The Clerk: Plaintiff's Exhibit 8 marked for identification.

(Release of Donald A. Chalmers, dated 20 May 1958, was marked Plaintiff's Exhibit No. 8 for identification.)

By Mr. Galiher:

Q. Do you happen to know anything about a release executed by Mr. Chalmers prior to the flight in question, Col. Kilkowski? A. Yes. By Adjutant General's order,

all persons who fly who are not designated crew members, execute that release.

Q. Is this a photostatic copy of the release in question? A. Yes, it is.

Q. Did you see this signed by Mr. Chalmers? A. No, I don't believe I witnessed it.

No, I did not. There are three witnesses on there, I am not one of them.

MR. GALIHER: Your Honor, this was furnished to me by Mr. Pettibone.

THE COURT: Furnished to you by whom?

MR. GALIHER: Mr. Pettibone. This gentleman can't say he saw it signed, but I assume it is authentic.

MR. PETTIBONE: Well, if the Court please, it is true I furnished plaintiff's counsel with a document, but on the other hand, I don't know whether it is authentic, I don't know whether anybody can identify the signature, either. I gave it to him because he asked us to produce documents and I did, but I didn't mean to guarantee that they are authentic, by so doing. I suppose it is, but I really don't know.

By MR. GALIHER:

Q. I wonder, could you do this for me, why don't we pass that for a minute and see if we complete your testimony this evening, then I might ask you to check into that overnight, if you would, and perhaps you could call me and I could then represent to Mr. Pettibone what I found.

MR. GALIHER: This, of course, is in accordance with the Federal Regulations. Defendant's Exhibit No. 4, Your Honor, that has been introduced into evidence, shows that it is a requirement to execute a release, such as was executed here, as you will see. I assumed, when Mr. Pettibone gave this to me, that this release was executed by Mr. Chalmers in accordance with that requirement. I will try to find out overnight, if you want me to.

MR. PETTIBONE: If I may offer a suggestion at this time, one of the witnesses appears to be Captain McCoy,
203 who is present. I have never interrogated him on that point, so I don't know what his answer will be——

MR. GALIHER: I haven't, either. May I do so, Your Honor? He is back here.

THE COURT: All right.

MR. GALIHER: Were you present, Captain McCoy, when this release was executed by Mr. Chalmers?

CAPTAIN MCCOY: Yes, I think my signature is on it.

MR. GALIHER: Thank you. I have a more legible copy, Your Honor, perhaps you would rather have this one than that one, which is indiscernible in certain parts. May this be substituted and marked, if you please?

THE COURT: Yes, it may be marked with the same number.

(Plaintiff's Exhibit No. 8 was received in evidence.)

MR. GALIHER: I think of one thing more, Your Honor.

THE COURT: All right.

By MR. GALIHER:

Q. Are you also instructed, under an Air National Guard regulation of the Department of the Air Force, that you and other technicians fall within and are subject to the purview of the Hatch Act? A. I believe so, yes.

MR. GALIHER: Thank you, that is all.

204 Your Honor, I will comment on that later. I am sure you know the Hatch Act.

THE COURT: Oh, yes, I know the Hatch Act.

Mr. Pettibone, I don't know whether your estimate of the time you will take, will be as inaccurate as Mr. Galiher's or not.

MR. PETTIBONE: I am afraid I am going to be a bit inaccurate because more matters came up on direct examination than I had anticipated.

THE COURT: Well, you proceed, we will see.

CROSS-EXAMINATION.

By MR. PETTIBONE:

Q. Col. Kilkowski, when were you first employed as an air technician? A. I was first employed as an operations officer, 104th Fighter Squadron, in January of 1951.

Q. By whom were you employed at that time? A. By the Air Technician Base Detachment of Harbor Field, where we were located at the time. Are you speaking of an individual?

Q. Both an individual and an organization is what I am seeking to find out about. First of all, do you remember what individual employed you? A. Major Souders was the Base Detachment Commander at the time, who had
205 the basic discussion of the job. I was contacted for the job by Col. Warfield, the Commander of the unit at that time.

Q. What was Col. Warfield's status? A. He was Commander of the 104th Fighter Squadron at the time.

Q. Was he an officer in the Maryland Air National Guard? A. Yes.

Q. Was he an air technician? A. No.

Q. He was a military officer in the Maryland— A. He was Commander of the 104th Fighter Squadron.

Q. When you were employed, was there an employment order of some kind issued? A. The order was issued by the State Adjutant General, Military Department.

Q. Who was your immediate supervisor at that time? A. Major Souders, who was Base Detachment Commander.

Q. Now, subsequently, you became the Base Detachment Commander, yourself, of this unit? A. I became Base Detachment Commander of Harbor Field in May of 1956.

Q. And you were so employed as an air technician on May 20, 1958? A. No, it was a different base. You are not employed as an air technician for a unit, you are
206 employed as the Base Detachment Commander of a base. Now, my base of operation in 1956 was Harbor Field. We subsequently moved to Martin Airport and

I became the Base Detachment Commander of Martin Airport in 1957.

Q. Well, I guess what I am getting at is, who would technically be your employer during that period from 1956 to the date of this accident, 1958? A. My employer?

Q. Yes. A. I was employed by the Military Department of the State of Maryland as an air technician.

Q. And you were so employed on May 20, 1958, and prior thereto? A. Yes, sir.

Q. And in that capacity, in that employment, who was your immediate supervisor? A. As Base Detachment Commander, I reported to the Adjutant General.

Q. Adjutant General of the State of Maryland, you mean? A. Yes.

Q. Now, you also had military status, that is to say, you were a commissioned officer in the Maryland Air National Guard at the same time, is that right? A. Yes.

Q. When were you first commissioned in the Mary-
207 land Air National Guard? A. December 12 of 1946.

Q. And in May of 1958, you were commissioned as a lieutenant colonel in the Maryland Air National Guard? A. Yes.

Q. Did you hold any other military commissions or ranks or grades, whatever you call it? A. There is one commission, it is a commission of the Maryland Air National Guard, a certain rank.

Q. How were you appointed to your rank in the Maryland Air National Guard, who appointed you to it? A. The appointment to the rank in the Air National Guard in a State is a function of the State, in order to qualify for Federal pay in that status, it is Federally Recognized.

Q. Now, while you were Base Detachment Commander —that is an air technician position? A. Yes, sir.

Q. While you were Base Detachment Commander of this 104th unit in May of 1958, Captain McCoy was also employed in an air technician status and assigned to that unit, is that correct? A. Yes, sir.

Q. Were you, therefore, his immediate superior in
208 connection with his employment? A. Yes, sir.

Q. And were you chargeable with keeping a record of his hours of attendance? A. It was my overall responsibility. The direct responsibility was delegated to the administrative officer.

Q. Well, in other words, either you, yourself, or by direction to your subordinates, you controlled his work? A. Yes, sir.

Q. Now, how many commissioned officers in the Maryland Air National Guard were assigned to the 104th at that time, that is to say, in May of 1958? Approximately how many will be sufficient. A. It is a guess, about 40 to 50.

Q. And were some of those also employed as air technicians? A. Yes, sir.

Q. That would include Captain McCoy? A. Yes, sir.

Q. About how many were so employed as air technicians? A. Again it would be a guess, it would be about eight.

Q. And the others, the other officers assigned to the unit were not employed as air technicians? A. No, they were not.

Q. Were they employed in other civilian pursuits, apart from the National Guard, is that what you mean?
209 A. Yes.

Q. How many of these officers were rated and were flying officers? A. About 35 were rated in the unit, military status.

Q. Did those rated officers, who were not air technicians, perform proficiency training flights during that period of time, that is to say, in May of 1958? A. Did they perform proficiency training flights?

Q. Yes. A. It was associated with their duties, yes.

Q. You mean associated with their military duties? A. Associated with their air technician duties.

Q. I am referring to those officers assigned to the unit, who are not air technicians. A. Who were not air technicians.

Q. Yes. A. Yes, they did perform proficiency training flights.

Q. And also those who were assigned to the unit as air technicians performed proficiency training flights also, is that correct? A. Well, you are getting into an area that is hard to define. There is no definition in air technician structure of what a proficiency training flight is. When you use the term "proficiency training flight," you have to go back to the military status, the two are
210 intertwined. We don't have a definition, as an air technician, of what a proficiency training flight is, so I would say yes in both cases.

Q. In other words, all the commissioned officers assigned to the unit, perform proficiency training flights in their military status? A. Yes.

Q. It was coincidental that some of them were also employed as air technicians? A. It was coincidental, if they happened to be on flying status and had a reason to fly associated with their position.

Q. Yes. At the time your deposition was taken, Col. Kilkowski, you stated you were Assistant Adjutant General of the State of Maryland. Are you still holding that position at the present time? A. I think the deposition is wrong, if it so states. I was Deputy Chief of Staff.

Q. Perhaps I misstated it. I believe you are right, it did state Deputy Chief of Staff of the Military Department of the State of Maryland. Do you still hold that position? A. I hold that position, yes.

Q. How long have you held that position? A. Since May of 1959.

Q. Now, on May 20, 1958, to your personal knowledge,
211 Captain McCoy was an employee of the Military Department of the State of Maryland in an air technician status? A. Yes.

Q. He was also a rated officer on flying status, assigned military status in the 104th Fighter Interceptor Squad? A. Yes.

Q. On May 20, 1958, you had authority to authorize rated officers, assigned to the unit, to perform aerial flights, is that correct? A. Yes.

Q. Did you have authority to authorize aerial flights by anyone who was not a rated member or on flying status? A. With the crew duty, you mean?

Q. To serve as pilot of a flight? A. Well, I could authorize any person who qualified in accordance with the Air Force regulations and we so did; for instance, an Air Force officer associated with the Martin Company could be attached to us for flying and I can authorize him to fly the aircraft, if he receives the basic authority from his superiors and our superiors in the National Guard Bureau. In fact, I will even cut a flight order for that man's flight. However, I have no authority over him or command jurisdiction. I think the "flight order" is a misnomer in the fact that a flight order does not allow me the right to order that pilot what to do, it is ordering the aircraft to flight, having complied with the regulations. And for instance, I have no command authority over the Air Adviser, Major Britton, yet each time he flies, we cut a flight order on him, we have to, because that is the way it is prescribed in the regulations.

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Q. Well, now, when an individual applies to you, as commanding officer of this unit, for permission to fly one of the aircraft assigned to it, what requirement do you have, with respect to his right to fly such an airplane? How do you determine whether he has a right to fly such an airplane? A. It is in the regulations.

Q. Which regulations? A. I don't remember the number right now, but the regulation which prescribes a flight order, I think, is 60-1. There is also another regulation that has a listing of the individuals who would be authorized to fly these aircraft, and the basic qualification that we are associated with is that he have an aeronautical rating, that he be on current flying status, whether this be an Air Force officer, an Air National Guard officer, a Navy officer on assigned duty with us, most anyone that fits

that category. We don't get into all the categories because we don't have plan representatives, such as the Air Force does.

Q. In other words, before you issue a flight order allowing that individual to fly one of the planes assigned to your unit, you have to satisfy yourself that he falls into one of these categories, is that correct? A. Yes, he has to fall within the category, we have to have the proper allocation of hours for support of that flying, yes.

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Q. Well, let me put it this way to you, Colonel. In order to fly, an individual has to have military status in compliance with the regulation which you referred to, does he not? A. Yes, he does.

Q. And an individual who does not hold such military status as defined in this regulation, would not be authorized to fly? A. Yes, sir.

Q. Now, in addition to a flight order which is required, there is also a flight clearance which is required to permit an individual to take off on a flight, is that true? A. Yes, sir.

Q. What is the nature—what is the difference, first of all, between a flight clearance and a flight order, what is the distinction between them? A. The flight order is the order which assigns the crew position, the aircraft authority to expend the fuel and lubricant for that flight, it is a listing of all the flights that your aircraft take, for the record. A local clearance is that form which is filled out to clear the flight for flight from that base, to insure that the aircraft is operating within the prescribed fuel allowances, we know it is going to be in the local flight area in case of some mishap, and that it will fly according to our general procedures.

214

Q. Now, does a flight order show the purpose of the flight which is authorized? A. I don't believe it did at that time. It might have changed, our new forms that are out now, Mr. Pettibone—but I think the purpose of the flight at that time was for general proficiency.

Q. Let me show you Plaintiff's Exhibit No. 2. This is Flight Order No. 105, dated May 20, 1958. Does that indicate the purpose of the flight made by Captain McCoy on that date? A. That is right, it is a general indication to maintain flying proficiency.

Q. Where does that show on that order, where do you find it on there? A. In the wording of the order.

Q. You mean right in the text of the order, itself? A. Yes.

Q. Was Major Joseph Maisch a duly authorized officer to issue flight orders in your name on May 20, 1958?

215 A. He is the operations officer, yes, sir.

Q. Now, does a flight clearance, which is issued, normally indicate the purpose or reason for a flight? A. It will indicate the general nature of the flight.

Q. Well, let me show you Plaintiff's Exhibit No. 1, which is the local flight clearance which Captain McCoy testified that he issued to clear his own flight on May 20, 1958. Is there anything on there that indicates the purpose of that flight? A. Mission symbol, which I say is general, we were operating under general instructions that tactical aircraft to the unit, our jet fighters and also the T-33 trainers which were tactical trainers, would use the Mission "O" at that time.

Q. And is that indicated on there, is that what that "O" stands for? A. Yes.

Q. Well, now, when Captain McCoy first came to you to discuss this particular flight, was that on the Saturday preceding the flight? A. The best I can remember, it was.

Q. And did he indicate to you at that time that he would make a general proficiency flight later the following week?

A. He indicated to me that he had a gentleman that

216 was interested in our program, would it be all right at some future date on one of his flights to take him along. I asked certain questions, what was his status, was he cleared in accordance with the regulations, I can't remember the exact conversation but it was along that general nature. He indicated that he was, and the follow-

ing Tuesday morning, I understand the gentleman came down to the field, Captain McCoy came into the office and told me that he was there, would I clear the flight, because at the previous discussion it was merely tentative. I gave him the usual discussion that we have whenever we take any passenger up, to take it easy with the individual because they frequently get sick on the first jet ride and he assured me he wouldn't do anything that would enhance the man's possibility of getting sick and we discussed the thing in general, who the boy was, and he departed for the flight. I was in conference with another officer, a supply officer at the time.

Q. Did Captain McCoy indicate the duration and extent of the flight? A. Generally, any flight of that nature is generally about an hour long, an hour to an hour and fifteen.

Q. Was any mention made by Captain McCoy or by yourself about it being a general proficiency flight, or a flight for operational proficiency, which I believe is
217 the term you used a moment ago? A. Just in general terms, by mutual understanding.

Q. Was it your understanding it would be a general proficiency flight for Captain McCoy? A. Within the realm of what I have explained here before, that there are purposes associated with a general proficiency which you can't draw a line and say that this is strictly for proficiency, there are other associated things along with it. If Captain McCoy didn't have a requirement to fly, he wouldn't be flying at all that day.

Q. I didn't ask you to confine it exclusively to proficiency. My question was merely, was it your understanding this would be a proficiency flight? A. In general, yes, sir.

Q. Then the flight was not made for any specific maintenance purpose, as far as you know?

MR. GALIHER: I object to that, I think he has explained this very fully.

THE COURT: I think we will suspend right now for the day. You are not anywhere near through, are you?

MR. PETTIBONE: No, Your Honor. I seem to have about a dozen points left here that I have to inquire into.

THE COURT: Colonel, I will have to ask you to return tomorrow. Be here at 10 o'clock, promptly.

THE WITNESS: Yes, Your Honor.

(Whereupon, at 4:15 o'clock p.m., the hearing was recessed pursuant to convening at 10 a.m., June 1, 1961.)

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Washington, D. C.
Thursday, June 1, 1961

* * * * * * * * * *

220

PROCEEDINGS

Lt. Col. Victor F. Kilkowski,

the witness on the stand at adjournment, resumed the stand and was examined and further testified as follows:

CROSS-EXAMINATION.

By MR. PETTIBONE:

Q. Colonel Kilkowski, what is a flying training period? A. Flying training period is period of inactive duty training which is assigned for our flying personnel on the basis of 36 per year. The requirement is that you can only get, say, twelve and one quarter of the year, and they are prescribed for flying training over and above the normal training assemblies that would be authorized in a reserve status, which are 48 per year and your 15 days field training.

Q. I see. Are these periods, flying training periods, authorized by law? A. I don't know whether they—I think they are authorized by the National Guard Bureau. Authority to the State to have the people in that status.

Q. You mean by regulation of the National Guard Bureau. Would you know the number or reference to that? A. I am sorry. I don't know the number offhand.

Q. Who participates in flying training periods? That

is to say, of those individuals assigned to the unit
221 which you commanded on May 20, 1958, which if any members of your organization participated in flying training periods? A. Flying training periods are authorized for officer and airmen personnel who have either an aeronautical rating and current flying status or crew duty with the flying status.

Q. Did such personnel who held such ratings on and before May 20, 1958 participate in such flying training periods to your knowledge? A. Yes, sir.

Q. Did that include Captain McCoy? A. Yes, sir.

Q. Of the people who participated, the personnel who participated in flying training periods, were some of them employed as air technicians? A. Yes, sir.

Q. And were there others who were not so employed as air technicians? A. Yes, sir.

Q. When an individual participates in a flying training period, how is he carried for pay purposes on the records of your organization, or how was he carried on the records of your organization on and before May 20, 1958? A. When an individual participates in flying training period
222 he is carried present for duty inactive duty status, inactive duty training status, and fulfills the requirements of the regulation which at that time were four hours of time attendance, an hour fifteen of flying.

Q. What kind of a record is kept? What is the title of it, or the name or number? How do you describe it and define it? A. I don't know the exact number of it. It is listed on a military payroll. It's a training assembly attended by a member of the unit.

Q. Do the people who are so listed as present for duty, for such duty, receive pay for the performance of that duty? A. Yes, sir.

THE COURT: When you say they are present for duty, they are present where?

THE WITNESS: Your Honor, present for duty in regard to—we are speaking in terms of flying training periods which are assigned for the principal purpose of flying time,

so that the officer in question would prepare a flight, undergo his general briefing, go out to the aircraft, make his flight, and land, and generally this encompasses about a four-hour period.

THE COURT: I understand all that. But you said that when they are having this flying training period
223 that they are present for duty on an inactive duty status. And they are inactive in what status, and they are present for duty in what capacity?

THE WITNESS: Present for duty at the organization in an inactive duty training status. I might clarify that members of the Air National Guard can be present for duty in various statuses, some of which are inactive duty training, active duty for training, inactive duty training without pay. These are statuses that we have to record in the unit, and in this particular case the flying training period falls under the inactive duty training.

By MR. PETTIBONE:

Q. These statuses which you have just referred to all refer to military statuses, do they not, as distinguished from air technicians status? I mean, at least they are different from air technician status? A. Yes. I think the word is "armory drill status," which follows over from the old National Guard, but the present definitions are "inactive duty training," "active duty training," "inactive duty training without pay."

Q. When a person is present for duty in any one of these statuses which you have just defined or described, he receives military pay for that duty, does he not? A. He does, but not in all cases.

Q. Well, generally he would, though? A. If he is
224 on inactive duty training on a prescribed training assembly, or on a flying training period, yes, he would receive pay.

To further clarify, if he had qualified for all his flying training periods and still had a general requirement to fly, he would have to fly on an inactive duty training status

without pay. Because he has qualified for all his pay training assemblies.

Q. In other words, when the funds are exhausted, if he continues to fly in this status, he does it without pay, then; is that it? A. It is not the funds are exhausted. It is that the man has qualified for all the pay periods that he can qualify in his reserve status.

Q. I see. Only a certain number are authorized per year, is that right? A. That is true. There are 36 flying training periods authorized per individual per year in addition to his 48 general training assemblies and his 15 days field training.

Q. Then would it be correct to say that for the first 36 times that he performs this duty he is eligible for pay and if he performs it more than the 36 times he would not be eligible for pay then? A. No, that would not be true.

225 Q. Explain why it isn't. A. Well, flying training period is a four-hour period, and if an officer reported for duty for flying training, say on a Saturday, and he flew in the morning, it is entirely possible that he could be present all day long and fly in the afternoon too. Now, the regulations prescribe that you can only get one of these flying training periods in a day. So that in the morning he would be present for duty; flying training period would be inactive duty training. In the afternoon, since he has already qualified for that pay, he would be present for duty on an inactive duty training status without pay.

Q. All right. I think that makes it quite clear. I would like to ask you this, though. The personnel who participate in these flying training periods, whether with or without pay, do so by virtue of their military status and their rating as a flying officer, or an airman; is that correct? A. Yes, sir.

Q. Now, some of those people would be air technicians and some would not? A. Yes, sir.

Q. In Captain McCoy's case he was an air technician, of course? A. Yes, sir.

226 Q. But he also participated in flying training periods sometimes? A. Yes, sir.

Q. In this other status for which he received pay sometimes? A. Yes, sir.

Q. Of course an air technician receives pay when he is performing air technician duties, does he not? A. Yes, sir.

Q. He receives his pay from a different source, though, and in a different manner, does he not? A. Receives the pay from the same source but in a different manner.

Q. I realize that. It all comes from the same source but it is carried on a different payroll and a different kind of payroll? A. Yes, sir.

Q. And the accounting principles are different, are they not? A. Yes, sir, they are.

Q. Can an individual receive pay for the same period of time both as an air technician and for a flying training period in one of these military statuses you talked about?

227 A. He can receive pay in both statuses only under two conditions: one, if he is on annual leave or if he is on compensatory time, which in both cases would mean that he would not be present for duty in his air technician status, and therefore would be eligible to be available for the military status. He cannot be present for duty for pay purposes in both statuses at the same time.

Q. Yes. That was what I was getting at. In other words, if he is performing training for which he receives military pay, he cannot be carried present for duty as an air technician at the same time. He either has to be on annual leave or on compensatory time, or just not working at all? A. That is right.

Q. If an individual is performing duty in one of these statuses, military status you described during a flying training period, and he were to be injured, how does he receive compensation for his injuries? First of all, let me put it this way: Is he entitled to receive compensation if he is injured in such status? A. Yes, he is.

Q. Under what provisions does he receive compensation for that injury? A. I am not exactly positive, but I think it is Public Law 881.

Q. Let me perhaps help you out by referring to
228 Title 32 of the U. S. Code, Section 318, which provides as follows:

> A member of the National Guard is entitled to the hospital benefits, pay and allowances, pensions, and other compensation provided by law or regulation for a member of the Regular Army or the Regular Air Force, as the case may be, of corresponding grade and length of service, whenever he is called or ordered to perform training under Section 502, 503, 504, or 505 of this title.

And then it continues on.

Would that be the authority under which he would receive compensation for injuries in that status? A. He would receive compensation and we would work with the regulations which prescribed it. If he is injured, and the injury goes beyond the training day, he would be hospitalized at the nearest military hospital, Air Force preferable, and receive his compensation. It would be requirement that a line of duty investigation be pulled in order to insure that he was in line of duty at that time.

Q. All right. Now let us consider the status of an air technician, on the other hand, for a moment. Sometimes they become injured or disabled during the course of the performance of their duties.

229 Let me withdraw that question just for the moment and go back to what we were talking about with regard to compensation benefits for a member of the military service or a person in military status performing training duty. I refer to Section 318 of Title 32. I believe I should also have referred to Section 319 of Title 32, which specifically provides as follows:

> Under regulations to be prescribed by the President, a member of the National Guard who is injured in line of duty while performing an aerial flight is entitled to the benefits of subsection (b).

Which then goes on to provide benefits. In other words, if an individual were performing an aerial flight as part of his flying training period duty, he would be entitled to the benefits thus provided by the section which I just referred to, would he not? A. He would be provided by benefits. I am not familiar with the law, Mr. Pettibone.

Q. There are regulations, I believe, which implement this section of the Code which I referred to. There are regulations covering this field that you know of? A. Yes, there are.

Q. You don't happen to remember the number of them, offhand? A. No, sir; I am sorry, I don't.

230 Q. The procedure generally, though, to your knowledge would be to have such an individual go to a military hospital; is that right? A. Yes, sir.

Q. Would he also receive, as far as you know, other benefits? That is to say, in addition to the medical treatment? A. I believe that if the injury is sustained he would receive other compensation. I am not too familiar with all the details of it.

Q. Yes. But do you know that there are provisions to that general effect? A. Yes, sir. There are provisions for both disability and death as a result of flying an aircraft.

Q. Incidentally, I believe I referred to a flying training period. Actually, though, these benefits would apply to an individual who was performing an aerial flight under any conditions, would it not?

MR. GALIHER: I object to that question.

THE COURT: What is the ground of the objection?

MR. GALIHER: I don't believe that it has any materiality to these sections that have just been referred to.

I will withdraw my objection. I withdraw my objection.

231 THE COURT: Do you want the question read, or do you understand it?

THE WITNESS: I would prefer to have it read, Your Honor, thank you.

THE COURT: Very well.

(The last question was read by the reporter.)

A. No, they wouldn't apply under any conditions. The conditions that you just outlined would apply if he were flying at field training, which is inactive duty training status. It would also apply on an inactive training status and under inactive training status without pay. They would not apply if he were carrying out his duties as an air technician, but under which you would be covered under the Federal Employees Compensation Act.

Q. Would it apply, then, to all of the various statuses, that is to say, the military statuses which you have referred to in your testimony? A. To the best of my knowledge, it would apply to all the military statuses.

Q. I see. But not to the air technician status, that is to say, a person injured while performing air technician duty? A. That is true.

Q. Now, returning to air technicians for a moment. Of course sometimes they are injured or disabled. Sometimes they even receive fatal injuries during the performance of their duties. What provisions are made for compensation in those cases? How are those benefits handled? A. Air technicians—If an individual is injured while present for duty in his air technician capacity, he is covered under the Federal Employees Compensation Act, which is administered by the Department of Labor.

232

Q. Well, have you had occasion, on or before May 20, 1958, to make reports to the Department of Labor concerning injuries to air technicians employed by the unit of which you were the base tactical commander? A. I don't believe our reports go to the Department of Labor. They go to the United States Property and Fiscal Officer.

Q. I see. What kind of reports do you make in those cases? Do you have a form you use? A. C.A. forms which have been discussed prior in this hearing. CA-1, CA-2, 16.

Q. What specifically is a CA-1? A. I can't remember all the details of it, but I believe the CA-1 is notice of report to the superior of an injury of an employee by an employee. And the information relative to the injury or sickness, or whatever it happens to be, is put on the form.

A request for admission for treatment, I think
233 that is the CA-2. I am not sure about the numbering system.

Q. When you forward these forms to the Property and Fiscal Officer, do you have to sign them? A. Yes. We execute them at the base; except those that are executed by the employee.

Q. On May 20, 1958, and immediately thereafter, who was the Property and Fiscal Officer for the State of Maryland? A. Colonel Irvin Ebaugh. E-b-a-u-g-h.

Q. Where was his office located? A. Office was at the State military reservation at Havre de Grace, Maryland.

Q. That is some distance from Martin Airport where you were located? A. I think it is approximately 30 miles.

Q. How do you get the reports to him? Do you mail them? A. We would get them there by the most expeditious means; either mail, or if we had a courier going up there for some other business.

Q. I believe I asked you before about how many persons were assigned to your unit who held flying status and who engaged in aerial flights. But to refreshen me would you again tell me how many such persons there were on
234 May 20, 1958. A. I think there were a total of about 35.

Q. Were they all commissioned officers? A. No. I think we had at that time one airman, technical sergeant I believe it was, on flying status in regard to the C-47 type aircraft.

Q. Just that one individual. But the others held commissions in the National Guard, is that right? A. Yes, sir; they held commissions in the National Guard, Air National Guard.

Q. And I believe you said about five of those individuals were also employed as air technicians; is that correct? A. There were five or six employed as air technicians. I might add that we also had one other individual, the Air Force adviser, who was on flying status with the unit, attached for flying.

Q. All of these individuals, including the air technicians, from time to time engaged in aerial flights as part of flying training periods, did they not? A. Yes, sir.

Q. Were flight clearances and flight orders issued in each instance when those flights were performed? A. Flight orders, which I stated yesterday is in all respects not a true order because there can be persons named on that order over which the commander has no jurisdiction.

235 It is an order to get the aircraft airborne, and there is a local flight clearance which is filled out in accordance with the prescribed Air Force regulations in order to clear the aircraft for flight, as I stated, to insure it has the proper fuel reserve, proper pilot. It is a record of the flight, in addition to a clearance for the flight.

Q. Well, with those explanations, nevertheless, flight orders as such, though, were issued, were they not, and the flights were listed and the individuals were named? A. Yes.

Q. In each case? A. Yes.

Q. And how are those flights normally referred to? How are they classified? Are they called proficiency flights? A. Generally, they were called proficiency flights. "Proficiency" is a very broad word, encompassing a lot of things. I don't know whether you understand, or I understand, what the true word "proficiency" means in flying.

Q. Well, isn't it customary, though, to refer to these training flights which are made by rated officers during these flying training periods, which, as you have explained, they are carried in military status and receive military pay, aren't they customarily referred to as general proficiency flights or operational proficiency flights?

236 Isn't that the custom of the military profession generally, including the National Guard? A. Yes, sir.

Q. Would it be correct, in view of what you have just said, to define the term "proficiency" as you have used it as meaning training in aerial flights for this purpose? In other words, are "proficiency" and "training in flying"

synonymous when used in this manner, to describe this type of activity? A. I think I am not being very clear. But perhaps I can explain by an illustration.

Q. All right. A. An individual can go on a flight and satisfy the requirements of two directives at the same time, one of which is Air Force directive or regulation 60-2, which concerns minimum proficiency training. It prescribes a minimum amount of flying time that must be obtained for individual proficiency. On that same flight he could be satisfying the requirements of ConAC directive, which prescribes the training of the unit. On this same flight, you might call one operational training and at the same time proficiency. It depends on which regulation you are looking at when you refer to the flight.

Q. In one sense, though, they both constitute train-
237 ing, don't they? A. They constitute training.

Q. So that in that respect "proficiency" and "training" would mean the same thing, then? A. For all practical purposes, I would say proficiency, training—you have a classification of flying which is annual proficiency, which is only assigned to those pilots who become combat ready, and they maintain that combat readiness, so you could say they are ready and combat ready, but they are still training. They are very difficult things to try to explain to a layman when they are difficult to understand by pilots.

Q. Now, on May 20, 1958, Captain McCoy stated to you personally that he wished to make an aerial flight, did he not? A. Yes. The purpose behind his stating to me was the fact that he had a passenger, if we had an understanding or SOP in the unit that that had to be directly approved by the commander in order to carry any non-crew member.

Q. Did he also state another reason for his making that flight was his own general proficiency? A. Yes, sir; we had that understanding.

Q. Now, of course Captain McCoy was also employed in maintenance duties as an air technician? A. Yes, sir.

Q. And I believe you testified and stated that in
238 your opinion a maintenance man, whenever he flies, generally observes the quality of the performance of the aircraft; is that correct? A. Yes, sir.

Q. So that you have stated that, since he was a maintenance man, whenever he performed an aerial flight Captain McCoy would automatically be checking the quality of the performance of the aircraft? A. That is a secondary portion of any flight, even though he would be doing that, yes, sir.

Q. In so far as you know, was the flight made by Captain McCoy on May 20, 1958, made for any specific maintenance purpose or function? A. No; it was not.

Q. Colonel Kilkowski, were you on Federal active duty on May 20, 1958? A. No, sir.

Q. Was Captain McCoy on federal active duty on that date? A. No, sir.

Q. If you and Captain McCoy were not on federal active duty on that date, was there any Regular United States Air Force officer on federal active duty who had command authority over either you or Captain McCoy? A. No, sir.

MR. PETTIBONE: No more questions, Your Honor.
239 Except I would like to say this, if I may at this time, with Your Honor's permission. I would like to ask that the witness be held as there is a possibility I may wish to call him in connection with other matters in the event those matters are developed by the plaintiff, which they have not been so far.

REDIRECT EXAMINATION.

By MR. GALIHER:

Q. Colonel Kilkowski, you told us yesterday, and then I believe you told Mr. Pettibone today, that Captain McCoy was carried on your rolls at your base on that day up to and including the flight in question as an air technician. Is it not a fact that, while it may be necessary

initially to have a military status to fly one of your planes, a person flying the plane may be performing at the time duties of an air technician? A. Yes, sir; he may.

Q. Mr. Pettibone asked you as to the purpose indicated to you by Captain McCoy for this particular flight in question. He did not mention any specific maintenance purposes for this flight. Was that necessary? A. It wouldn't be a specific maintenance purpose for the flight. It also wouldn't be necessary for him to so inform me. There are procedures whereby we have the operations office, have the maintenance office, and each flight does not have
240 to be cleared through me personally as long as it is in conformance with our regulations.

Q. So Captain McCoy might be checking on maintenance in a particular flight and not mention to you that that was one of the things he was doing? A. He could not be checking purposely for maintenance on this flight because if he had, we would not allow a passenger on the flight.

Q. What about checking on a particular flight the operation of the plane, the instruments, and all of that sort of thing? A. Yes, sir. In each flight that takes place, particularly by a maintenance officer, he would be, by the very nature of his function and duty, be more apt to observe the product that is being maintained by his people if he were a maintenance officer. This is why it is desirable and I think it is why General Wilson stated that he would require that his maintenance officer as well as his base detachment commander be flying officers. Why? Because he will get better maintenance, safer aircraft, and as a result a better unit.

Q. You also mentioned a number of other reasons; to check the air strips, to check the entire personnel, and a number of other things; is that correct? A. That is true.

241 Q. All of which could very well have been included in this particular flight? A. That is true.

Q. The only type of flight that you cannot carry a pas-

senger on is a specific check flight; is that right? A. That is true.

Q. Now, did you also mention, or I don't believe it was asked, that one of the reasons indicated to you for this particular flight was to interest this man in recruitment for the Air Force Flying Training School? A. To be perfectly clear, it is not the reason for the flight; it is the reason for the passenger flying in the aircraft.

Q. The reason for the passenger being in the plane? A. Right.

Q. The flight would have proceeded anyway? A. Yes.

Q. And that was the United States Air Force Flying Training School? A. That would be the quota given to the National Guard Bureau. The individual would go to the United States Air Force Flying Training School since the Air National Guard does not operate a pilot training school. Then the individual would be returned to us with the requirement that he stay on duty with the Mary-
242 land Air National Guard for a minimum of three years.

Q. Mr. Pettibone asked you about Section 318 and 319 of Title 32 of the U. S. Code. A. Yes, sir.

Q. Concerning benefits, hospitalization, and otherwise, that might be paid to persons injured while on active duty? You recall those sections he referred to you? A. I don't remember the words "active duty." But I remember him referring to them.

Q. Or flying training period? A. That is not "active duty," sir. That is inactive duty training.

Q. Inactive duty training. I beg your pardon. Captain McCoy did not receive any benefits under those sections, did he? Was he not paid under the United States Employees Compensation law? Or did he not receive his benefits under the United States Employees Compensation law? A. You use two phrases. You use "pay" and "benefits."

Q. I meant benefits. A. His pay continued in accordance with the air technician sick leave authorization. His bene-

fits, hospitalization, doctor bills and what not, I understand were taken care of by the Federal Employees Compensation Act.

Q. And did you handle his case as a routine case just the way you handle other cases involving air tech-
243 nicians who might be injured in the line of duty? A. I don't think that there was anything routine—other than routine, except that Captain McCoy's hands were burned and he could not sign the form and permitted Captain Windlyn, my administrative assistant at the time, or personnel man, to execute the form for him, in his presence.

Q. There has been some testimony which indicates that he did not fly after this accident. He requested that he be taken off flying status. Would you tell us the reasons behind that, if you please. A. Captain McCoy was injured as a result of this accident, as you know. It has been testified to. He could not fly. His hands, when they were healing, became very stiff. He was not allowed to fly for—I don't know the period of time. Also, I would say two or three months, when he started to be concerned about this thing as a subsequence to the accident. Also, he was, as a result of the accident, absent from his maintenance duties. So that when he came back he had the normal supervisory workload that would pile up in the absence of a supervisor. And he realized that he would have difficulty picking back up both his maintenance supervision duties plus catching up on all the flying time. I think, also, the accident itself and the mental approach to the things caused him to submit a voluntary request for suspension from flying status. This request was
244 forwarded to appropriate authorities and, since we don't control either placing on or taking off of flying status locally, it was approved by the Air Force that he not be on flying status.

Q. Is that the United States Air Force? A. Yes, sir.

Q. And also had Major Mitchell, the maintenance supervisor, returned in and around that period? A. Major

Mitchell returned just either about that time or shortly thereafter. And our intentions were to use the services of Major Mitchell as a base maintenance supervisor in a flight-test capacity. However, I don't think that that would be the reason why Captain McCoy is not flying, because, as a commander, I would have preferred to have both my maintenance supervisors on flying status and capable of checking the equipment.

Q. Thank you, sir.

Captain McCoy was not engaged in a flying training period at the time of the accident? A. No, sir; he was not engaged in a flying training period in accordance with the regulation. Now, the court of law decides if he was engaged in flying training; I couldn't decide that. He could not apply for flying training period by virtue of the regulation. He had accumulated his maximum of 36. He was present for duty, marked present as an air tech-
245 nician. And this would preclude his possibly applying for flying training period.

Mr. Galiher: Thank you, sir.

Recross-Examination.

By Mr. Pettibone:

Q. Colonel Kilkowski, when an individual has been performing an aerial flight prior to a military training period ~~or otherwise~~, in his military status, and he receives injuries for which he would be entitled to benefits under certain basic provisions of United States Code, do you customarily make a report to anyone concerning those injuries with a view toward supporting an application for the award of such benefits as are thus provided by law to the injured individual? A. Are you speaking of in military status?

Q. That is right. I am talking about the military status. Any one of these military statuses you told me about before. A. I don't know the number or name of it right now, but there is a report, and I think there is a require-

ment that if the injury is to be sustained beyond the period of training, a line of duty investigation be performed in order to support the claim for benefits.

Q. Then normally when such an individual in such status is injured you would fill out and forward those forms
246 in accordance with this general procedure; is that right? A. Yes.

Q. You have also stated, I believe, that when an air technician receives injuries he is entitled to benefits under the Federal Employees Compensation Act and you have other forms which you then fill out and forward in such cases? A. Yes, sir.

Q. And these two sets of forms, these two procedures, are different, are they not? A. Yes, sir; they are different.

Q. Now, with respect to Captain McCoy's injuries on May 20, 1958, which of these two procedures did you follow? A. We followed the procedures of the Federal Employees Compensation Act.

Q. And you did not forward the forms or fill out the forms or follow the procedure for injuries to people in military status in his case? A. That is true.

Q. You are a rated flying officer yourself, aren't you, Colonel? A. Yes, sir.

Q. And to obtain your rating, and I suppose from time to time since you obtained it, you have had to un-
247 dergo courses of training for flying officers, have you not? Courses of training—you have attended flying schools, in other words? A. Yes, sir.

Q. Incidentally, how long have you held a flying rating? A. Since February 1944.

Q. Now, you are familiar, then, I take it, with the training which is normally provided in these flying training schools for applicants for flying ratings, and for the training of people who already hold such ratings; is that correct? A. Yes, sir.

Q. Does part of that training include instruction, at least in a general way, concerning the maintenance of aircraft? A. Yes, sir; it does, in a general way.

Q. I take it that every rated officer in flying status will at one time or another pursue these courses of training or instruction which I have just referred to. That would be a necessity, would it not? Generally, at least? A. Well, it would be a necessity that they go through pilot school. It wouldn't be a requirement that he go through any other Air Force schools.

Q. Well, he would have to attend a pilot school
248 once, though, in order to get the rating, would he not? A. Yes.

Q. He would have to attend it for a period of time to complete the course? A. Well, are you speaking of the Air Force Pilot School?

Q. Yes. A. He could attend the Air Force Pilot School. This is the normal procedure for attainment of an aeronautical rating. He could also attend the Navy or one of the other branches of the service flying school and qualify for his rating if the Air Force sees fit to recognize such under a Flying Evaluation Board proceeding.

Q. All of these schools, though, in addition to other things which they teach, also give some instruction in maintenance, do they not? A. Yes, sir; they do.

Q. So that one could conclude therefore, I assume, that any rated flying officer would have some knowledge of maintenance of aircraft, would he not? A. He would have a limited knowledge.

Q. Well, he would have some knowledge? A. Well, definition "some," or limited. I am not trying to be evasive but——

Q. All right. All right. I accept your terminology.

249 Well, then, couldn't you say that every officer, whenever he performed an aerial flight, is paying some attention to the performance of the aircraft from a maintenance point of view? A. Pay some attention to it. But it wouldn't be as qualified a judgment as that of a maintenance officer.

Q. Nevertheless, he would have some judgment, would he not? A. That is true, but——

Q. Well,——

MR. GALIHER: Let him finish, please.

By MR. PETTIBONE:

Q. I am sorry. Finish. A. There are technicalities in a jet aircraft that, in regard to maintenance—for instance, the fluctuation of an oil pressure gauge might not mean anything to me. To a maintenance officer it might mean a source of trouble. The same way with a fluctuation, the way the fuel pressure at your inlet nozzle is fluctuating might mean more to him than it would perhaps to one of our junior officers. However, if the gear won't come down, well, certainly a junior officer can recognize that, as well as the maintenance officer. So there are refinements that the maintenance officer will pick up: the way the aircraft handles. Is it properly rigged? I am not as
250 qualified to tell that as a maintenance officer. He knows the procedures. Spends his life's work in that. And he is more capable of analyzing maintenance problems than the average pilot.

Q. All right. But, conversely, could not one also say that there are many basic types of possible malfunction of an aircraft which would be readily recognized by anyone who is a pilot, whether he is a maintenance officer or not? A. Yes. There are basic malfunctions that could be recognized.

MR. PETTIBONE: That is all, Your Honor.

MR. GALIHER: Your Honor, I have no further questions of Colonel Kilkowski.

THE COURT: Colonel, you may step down. But I believe that you should remain for the present.

THE WITNESS: Yes, Your Honor.

(The witness stepped down.)

THE COURT: At this time we will take a recess of five minutes.

(Thereupon, a recess was taken until 11:08 a.m.)

AFTER RECESS

MR. GALIHER: Next, Your Honor, on behalf of the plaintiffs, I would like to offer into evidence deposition of Colonel Irvin E. Ebaugh, and, if Your Honor would not mind referring to it, there are several portions of his questions and answers that I would like to bring to
251 Your Honor's attention at this time. I am offering the whole deposition.

THE COURT: I take it there is no objection?

MR. PETTIBONE: No objection, Your Honor.

THE COURT: Very well. Admitted.

(Deposition of Col. Irvin E. Ebaugh was marked Plaintiffs' Exhibit No. 9 and received in evidence.)

MR. GALIHER: Colonel Ebaugh testified that he was Lieutenant Colonel Irvin E. Ebaugh, State Military Reservation, Havre De Grace, Maryland; that his job, since 1955, was that of United States Property and Fiscal Officer for the State of Maryland with an office located at the State Military Reservation at Havre De Grace.

Next, he was asked abou his duties, and he said:

> I am charged with properly handling any federal moneys appropriated to the State of Maryland or allotted to the State of Maryland for the support of the National Guard, to maintain all accountable records for federal property that is sent to the state for use by the National Guard.

He said that the records, the handling of them, have been delegated to his assistant, who was located at the Air National Guard base.

252 He also stated that he processed permanent duty technician pay rolls and maintained the records for those pay rolls at that time.

Also, he stated that he had occasion to forward papers pertaining to air technician employees, civilian employees of the Maryland Air National Guard through his office to other agencies or departments of the Government.

Then he was asked specifically concerning the compensation claim of Captain McCoy as a result of this accident.

MR. PETTIBONE: Excuse me, Mr. Galiher. Would you please refer to page numbers?

MR. GALIHER: Page 17 is where that is referred to now, Mr. Pettibone.

MR. PETTIBONE: Thank you.

MR. GALIHER: And he is asked:

"Do you recollect that you ever processed any such papers through your office pertaining to one Captain Julius R. McCoy, of the 104th Fighter Intercepter Squadron of the Maryland Air National Guard?"

He answered: "Definitely, yes."

Next question:

"Do you remember particularly what those papers or documents were relating to Captain McCoy which you processed through your office to the Bureau of Em-
253 ployees Compensation?

"Answer: This was, of course, the papers that are needed by the Bureau of Employees Compensation in support of any claims in payment of hospitalization that might arise out of an injury."

Next, he refers to the forms, which have already been identified by both Captain McCoy and Colonel Kilkowski, so I will not read that.

Then he is asked:

"Where these special forms pertaining to this particular accident of Captain McCoy's, or are they forms of a general nature used in all cases?"

And he answered:

"They were forms of a general nature used in all instances for technicians."

Then he is asked where they come from. And he says:

"They are provided from normal government channels, the same as you get other forms from the Department of Labor."

Then he brings out that the forms had been filled out, the forms previously identified, and sent to him by Colonel Kilkowski, the commander, as Your Honor has heard from the testimony. Then, he forwarded these forms, with other material that you will see reference to in a minute,
254 to the Department of Labor.

I would like at this time to introduce into evidence—if I may have that?

Your Honor, I have five documents signed by Lt. Col. Ebaugh, photostatic copies of them, from the Bureau of Employees Compensation Commission, that I would like to have marked for identification at this time.

THE COURT: Very well.

THE DEPUTY CLERK: Plaintiffs' Exhibit 5-F, 5-G, 5-H, 5-I, and 5-J, for identification.

(Documents shown to Mr. Pettibone.)

MR. GALIHER: May I refer Your Honor, in case they object, to the bottom of page 34 and you will see full description of his status there.

Do you have any objection?

MR. PETTIBONE: I object to their being admitted in evidence.

MR. GALIHER: I offer them, Your Honor.

MR. PETTIBONE: Defendant objects to their admission in evidence.

THE COURT: What is the ground for your objection?

MR. PETTIBONE: If the Court please, these are documents which pertain to a proceeding of an administrative nature in the Bureau of Employees Compensation, the Department of Labor, with respect to a claim which was filed on
255 behalf of Captain McCoy as a result of the injuries which were sustained in this accident. If they serve any purpose at all in this proceeding, it would be to show the determination made by that agency administratively concerning the claim of Captain McCoy. That, in turn, would hinge upon his status at the time of the accident.

Without going into a lengthy discussion of the principles of administrative law which are involved, I merely refer to the case of Pearson against Williams, which I cited previously, a Supreme Court of the United States decision, 202 U. S. 281, which in turn has been followed by a number of other decisions in various other Federal courts, the effect of which is to indicate, state and hold that an administrative determination of this nature can have no binding effect, have no legal effect, upon the status of the individual.

I, therefore, take the position, since these records could only be offered for that purpose, since they cannot serve that purpose, they should not properly be introduced in evidence before this Court. They relate to an issue which is the issue before the Court and which must be determined by the Court from the evidence which has otherwise been here presented. All of the basic material otherwise, I believe, is in the course of being presented, if it has not already been. And these records pertain only to
250 administrative action taken by another department of the Government, which has no binding effect whatsoever and no legal status or standing under this line of decisions following Pearson against Williams in this case.

THE COURT: Mr. Galiher, where did you get these records?

MR. GALIHER: These are from the compensation file, which were identified and we were permitted to keep copies of it, Your Honor.

THE COURT: Admitted.

(Plaintiffs' Exhibits Nos. 5-F, 5-G, 5-H, 5-I, and 5-J for identification were received in evidence.)

MR. GALIHER: The question on page 20:

Your certificate states that he was a civil employee of the United States at the time of injury and not a member of the Maryland Air National Guard. What was the basis of the information for making this certificate?

This is the one referred to at that point. May I hand it up to Your Honor?

And he goes on—

THE COURT: "G," I believe, or is that "J"? Which is this?

MR. GALIHER: "G," Your Honor.

257 THE COURT: Very well.

MR. GALIHER: And at the bottom of page 20, in explaining that, he said:

"Captain McCoy, as his duties, as a permanent air technician, is actually a civilian employee and, as such, is not a member of the Guard during the normal 40-hour week he is expected to work."

Then, on page 22, he indicates that he followed the normal and customary procedure.

Page 24, he is asked:

"How long had you known Captain McCoy?"

And he answers:

"I had known of Captain McCoy since he had been employed as a technician. Personally, I did not know him too well.

"Question: You were acquainted with his duties?

"Answer: I knew he had been hired as a technician at the Air National Guard. I didn't have full and complete knowledge of his duties. This is beyond the scope of my responsibilities, to have such knowledge.

"Question: These forms that you filled out in this case were similar to other forms that you used in connection with other compensation cases at your base?

"Answer: That is right. They are. We use them for Army technicians and air technicians, the full-time

258 technicians, both Army and Air.

"Question. And your investigation led you to believe that you were justified in filling them out the way you did?

"Answer: Yes, definitely."

I would like to hand Your Honor, at this time, 5-F.

Page 26:

"What was your title in May of 1958, Colonel?

"Answer: As the United States Property and Fiscal Officer for Maryland.

"Question: And you held a commission from whom?

"Answer: I am actually on active duty. I was called to active duty by the Department of the Army.

"Question: And you were at that time?

"Answer: Yes."

Then:

"What were your duties as far as the 104th Squadron at Martin Field was concerned?

"Answer: My interest in the 104th Squadron, Fighter Squadron, is to see that they are properly supported equipmentwise and that funds that are given to the State of Maryland for the operations, to support the operations, were handled promptly.

"Question: You mean funds from the United
259 States Government?

"Answer: Federal funds."

On page 27, he mentions the name of his assistant, Major James I. Considine, who was located at Martin Field.

Suppose I read this question:

"Was he a major of the United States Air Force at that time? We are inquiring into May 20, 1958.

"Answer: National Guard. He was a National Guard officer. As a technician, he enjoyed the same position as Colonel Kilkowski, Captain McCoy, the balance of the permanent-duty technicians employed there.

"Question: That was what again, please?

"Answer: Base Supply Officer.

"Question: Of the United States Air Force?

"Answer: He was the Base Supply Officer of the 104th Fighter Squadron at that time. That was the title he had.

"Question: Did he have a commission in the United States Air Force at that time?

"Answer: In the National Guard.

"Question: In the National Guard?

"Answer: In the National Guard, State of Maryland, the Air Force. He was commissioned in the Air Force of the State of Maryland."

260 MR. PETTIBONE: If the Court please, due to the fact this whole deposition has been introduced into evidence, it would seem to me that reading selective portions of it in this manner at this time amounts in effect to a presentation of some kind of legal argument. I do not believe this is the proper time.

THE COURT: It is not at all unusual, in cases where there is a deposition, for a person to summarize it. But I always have the whole thing read, if anybody objects.

Do you object?

MR. PETTIBONE: If I understand correctly, from what the Court said, then the Court will ultimately read the whole deposition, I take it, since it has been introduced in evidence. In that case, I guess I won't object.

THE COURT: The deposition was offered and no objection was made to the offer of the deposition itself, so it was received. Now, Mr. Galiher has called attention to parts of it that he specially relies upon. You may call attention to any other part that is in here that you wish.

MR. PETTIBONE: All right. That is satisfactory. Thank you, Your Honor.

MR. GALIHER: On page 34:

"Question: Colonel Ebaugh, was it a part of your duties as U.S. Property and Fiscal Officer to certify Julius R. McCoy as the civil employee qualified to apply for

261 compensation?

"Answer: That is true, yes, and for any other technicians on our pay roll."

And then I have called Your Honor's attention to the material at the bottom of page 34, where he was asked as to his immediate supervisor and he said:

"I am assigned to the Chief of the National Guard Bureau here in Washington.

"Question: Who is your immediate superior there?

"Answer: It would be the Chief of the National Guard Bureau, General McGowan.

"Question: How about General Wilson?" And that is the General Wilson whose testimony is already before you in deposition form, Your Honor.

"Answer: General Wilson is the Chief of the Air Division. In this respect you might say I am wearing two hats, because I am working for the Air and the Army National Guard.

"Question: That is a federal agency?

"Answer: That is right.

"Question: You are not a member of the Maryland National Guard?

"Answer: No, I am not. I am a member of the Maryland National Guard on active duty. I have been called
262 to active duty in order to hold the position I have."

May I hand these back? They have already been introduced into evidence.

THE COURT: Have you finished reading everything you want to read in there?

MR. GALIHER: Yes, ma'am, I have.

THE COURT: Mr. Pettibone, if there is anything you want to mention that has not been covered, you may.

MR. PETTIBONE: Thank you, Your Honor. I would like to ask the Court to turn to page 24 of this deposition of Colonel Ebaugh. I invite the Court's attention particularly to the following questions and answers:

"Question: Did you personally talk with Julius R. McCoy before you forwarded these forms by this letter of transmittal with this certificate?

"Answer: No, I did not.

"Question: Had you personally talked with Colonel Kilkowski, the detachment commander, before you forwarded this letter of transmittal with the certificate?

"Answer: No, I did not.

"Question: Had you personally investigated the accident in which Captain McCoy was involved on May 20th before you forwarded the letter of transmittal and the certificate?

263 "Answer: No, I had no part in the investigation nor did I make any of my own."

That is all, Your Honor.

MR. GALIHER: Next, Your Honor, I would like to offer into evidence the testimony offered in deposition of Major Milton D. Britton.

And instead of trying to read from that, may I ask Your Honor to glance at it at this time, if you please.

THE DEPUTY CLERK: Plaintiffs' Exhibit 10.

MR. PETTIBONE: No objection, Your Honor.

THE COURT: Very well. It is admitted.

(Deposition of Major Milton D. Britton was marked Plaintiffs' Exhibit No. 10 and received in evidence.)

THE COURT: Mr. Galiher, a day or so ago you said you had certain depositions that you were offering. You did not list them, however. They were handed to the clerk and she marked them filed. But I wonder if they have been identified anywhere in the record. There are quite a few depositions here, and I want to be sure what you have in and what is not in.

Colonel Kilkowski testified. So you did not offer his deposition, I take it.

MR. GALIHER: I did not. But I understand Mr. Pettibone wanted to enter into a stipulation, and we did

264 enter into a stipulation, as you will see in the pretrial order, which provides that the depositions of General Wilson, Captain McCoy, Colonel Kilkowski, Colonel Ebaugh,

Major Britton, and I believe Major Scott, might be offered into evidence and that if it was desired to offer the oral testimony of any of those witnesses, which we have done—I understand he is not going to—that would be all right, but still, Your Honor can use the depositions, as can counsel, for any purpose that they may see fit.

MR. PETTIBONE: That is correct. That was the agreement made at the time of the pretrial conference, Your Honor.

MR. GALIHER: Therefore, I think we both jointly ask that these various depositions be received into evidence, if they have not been formally introduced prior to this.

THE COURT: I thought that ought to be clear. Then the depositions of Captain McCoy, Colonel Kilkowski, Major Scott and Colonel Ebaugh are admitted.

What about these depositions of Charles A. Laymon, Charles A. Floyd, Lawrence M. Scott, and Richard S. Ackerman?

MR. GALIHER: They have nothing to do with the issue presently before the Court. They go into the liability phase of the matter, Your Honor.

I won't think any of the material in there would be
265 in any way helpful to Your Honor in passing on this issue, whether he was an employee of the United States.

THE COURT: We mentioned, was it General Wilson?

MR. GALIHER: Yes, ma'am.

THE COURT: That is admitted.

All right. Then I believe that clarifies it.

MR. PETTIBONE: Could we ask the reporter just to read those names over once more so we can check them off our list here?

THE COURT: Certainly.

(The following was read by the reporter:)

". . . which provides that the depositions of General Wilson, Captain McCoy, Colonel Kilkowski, Colonel Ebaugh,

Major Britton, and I believe Major Scott, might be offered into evidence. . . ."

THE COURT: Then they are all admitted.

MR. PETTIBONE: That is our understanding, Your Honor.

(Depositions of General W. P. Wilson, Captain J. R. McCoy, Major John Scott, Col. V. F. Kilkowski were marked Plaintiffs' Exhibits Nos. 11, 12, 13, and 14, respectively, and received in evidence.)

THE COURT: I have finished looking at this de-
266 position of Major Britton.

MR. GALIHER: Next, may it please Your Honor, I would like to have marked for identification NGR Regulation 75-16, National Guard Regulations, also captioned Department of the Army, Washington, D. C., December 1947, Accounting Clerks and Caretakers.

THE DEPUTY CLERK: Plaintiffs' Exhibit 15 marked for identification.

(National Guard Regulations No. 75-16, Accounting Clerks and Caretakers, was marked Plaintiffs' Exhibit No. 15 for identification.)

(The exhibit was shown to Mr. Pettibone.)

MR. GALIHER: Your Honor, counsel is going to object to this and I would like to point out my reason for making the offer of this regulation. The cases which have been cited—

THE COURT: You mentioned two things. Which are you talking about now?

MR. GALIHER: I am talking about 75-16, Plaintiffs' for identification No. 15, National Guard Regulations, Department of the Army, Accounting Clerks and Caretakers, it is captioned.

This particular regulation was not in effect at the time of this accident.

267 THE COURT: You mean it was in effect before or after?

MR. GALIHER: This regulation was in effect at the time of the first case on the subject, having to do with caretakers, which was cited to Your Honor at the outset of this case by me. That was the Holly case, United States vs. Holly. The language contained in this regulation, which is a National Guard regulation, Department of the Army regulation, is referred to in the Holly case, both in the body of the case—that is 192 F.2d 221—and in the footnotes.

I want to also offer to Your Honor the Air National Guard Regulation 75-16, parts of it rather, and parts of Air National Guard Regulation 40-01, which were actually in effect at the time of the accident.

The case of United States vs. Wendt, W-e-n-d-t, also previously cited to Your Honor, and likewise dealing with caretakers, found in 242 F.2d 854, again refers to caretakers, and that case was decided under the regulations which were in effect at the time of this accident. And I think Your Honor should have them both before you so that you can see the attempt on the part of the National Guard Bureau, the Air Force and the Department of the Army to avoid the implications of the case of United States vs. Holly. And you will see in the Wendt case that they analyze the regulation which was actually in effect at the time of our
268 accident, and say it is exactly the same situation, that of a technician and that of a caretaker.

And therefore, because counsel would argue to you that the regulations were changed following the Holly case, I think Your Honor, for your guidance and help, should have before you actually the regulations which were in effect—at least the part of the regulations that I want to offer—in connection with the Holly case which does not appear from the case, and likewise the regulation which was in effect showing the change at the time of our accident and which was passed upon in the case of United States vs. Wendt. That is my sole purpose. And I submit it is a very proper purpose. And with that limited reason, I make the tender of that earlier regulation.

THE COURT: Do you want to be heard, Mr. Pettibone, on this?

MR. PETTIBONE: Well, in view of the explanation made by plaintiffs' counsel, these regulations were not in effect at the time of the accident, as long as that is understood, I won't object to their being introduced for the other reasons which he stated. If it will be helpful to clarify in any way these prior decisions, I won't object.

THE COURT: He did not say that all of these regulations were not in effect. He said that one was not in effect, if I understood him correctly, I understood him to say
269 that 75-15 was not in effect.

MR. GALIHER: No. 75-16 was in effect and is referred to. But I want to show you the change with respect to caretaker.

THE COURT: Yes, I know. What I understood you to say was that the regulation that was not in effect was 75-15.

MR. GALIHER: No, ma'am. I have referred to the same one throughout, 75-16, and then I referred also to another regulation, 40-01.

THE COURT: I understood you to say that the ones that were in effect were 75-16 and 40-01 at the time of the accident which is involved here.

MR. GALIHER: That is right.

THE COURT: Then you said that one was in effect at the time of the Holly decision which was not in effect at the time of this particular occurrence involved here. That regulation was, I thought you said, 15. What did you say?

MR. GALIHER: What I said, Judge Matthews, was: It likewise carried the same number at the time of the Holly case, 75-16, but the language, as you will see, was changed after the Holly case.

THE COURT: I see. Then what you are saying is that the 75-16, or the 16 rather, that was in effect at the
270 time of the Holly case, was amended or changed by the time of this occurrence, so that 16 now, the one that was in effect at the time of the accident, is different

from the 16 that was in effect at the time of the Holly decision.

MR. GALIHER: I say the language is different, as I will show you, but the application of the law to the language is exactly the same.

THE COURT: Yes. From what I understood Mr. Pettibone to say, he was, I thought, intimating that none of these regulations referred to were in effect at the time of this particular occurrence. That is what I was trying to get straight.

MR. PETTIBONE: That was due to the fact that the one that Mr. Galiher showed me was one which was not in effect at the time of the accident.

May I see the other one involved here?

THE COURT: Yes, certainly.

MR. GALIHER: I intended to have these marked and shown to him next. May I now do that, Your Honor?

THE COURT: Yes. Maybe we will get it straight.

THE DEPUTY CLERK: Plaintiffs' No. 16 for identification. And Plaintiffs' 17 for identification.

(National Guard Regulation 75-16, Field Civilian Personnel, and ANGR 40-01, Civilian Personnel, were marked Plaintiffs' Exhibits Nos. 16 and 17 for identification respectively.)

271 (The exhibits were shown to Mr. Pettibone.)

MR. GALIHER: Your Honor, just with the thought that perhaps on those two cases I did not indicate they were Federal Second, may I call those to Your Honor's attention, please?

THE COURT: Yes, certainly.

Mr. Galiher, are you concluding at the end of this?

MR. GALIHER: Yes, I am. I have one or two more things to introduce: documents, and a section of the Maryland Code which I would like to call to Your Honor's attention.

MR. PETTIBONE: I may explain our delay, Your Honor, is due to the fact that these regulations keep being changed

and superseded, so it is difficult to check any given one out.

THE COURT: I was wondering if we couldn't pass over that and you could finish with your other matters maybe. You have had a witness here since this morning.

MR. PETTIBONE: That is true, Your Honor.

THE COURT: There is to be a meeting of the Judges, I believe, at one o'clock, and the recess may be a little longer than it usually is.

MR. PETTIBONE: That would give us still more
272 time, then, to straighten these things out. We will have the same problem, incidentally, for the defendant, because we have some regulations also which we wish to offer. So, during that period of time, perhaps counsel for both sides can work out the problems that relate to it so we will be ready to proceed with dispatch then.

THE COURT: Very well.

MR. GALIHER: May I then introduce into evidence and call Your Honor's attention to the Annotated Code of Maryland, Article 1(a), Section 10, dealing with collision of aircraft, which reads:

The liability of the owner of one aircraft to the owner of another aircraft, or to airmen or passengers on either aircraft, for damage caused by collision on land or in the air shall be determined by the rules of law applicable to torts on land.

Thank you.

Subject to the documentary, that completes our case, may it please the Court.

THE COURT: Would you like to go on with your witness?

MR. PETTIBONE: Yes, Your Honor. I think we can do this rather quickly.

Mr. Stasko.

273 Thereupon

John James Stasko

called as a witness by the defendant, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Pettibone:

Q. Will you state your full name, Mr. Stasko. A. John James Stasko.

Q. Where do you reside? A. 3002 Bryan Street, Alexandria, Virginia.

The Court: Will you spell your last name.

The Witness: S-t-a-s-k-o.

By Mr. Pettibone:

Q. Where are you employed? A. Bureau of Employees Compensation, Department of Labor.

Q. Is that the United States Department of Labor? A. Yes, sir.

Q. Where do you work, physically? A. At the present time, I am employed as a management analyst.

Q. Were you employed by the Department of Labor on May 20, 1958? A. Yes, sir.

Q. Have you been so employed at all times since
274 then? A. Yes, sir.

Q. What were your duties on May 20, 1958? A. I was an acting claims examiner supervisor.

Q. What specific part of the United States Department of Labor did you work in? A. Within the Bureau of Employees Compensation, which administers the Federal Employees Compensation Act.

Q. What was your job title at that time, in 1958? A. Acting claims examiner supervisor.

Q. What were your duties in that position? A. Well, the function of a claims examiner supervisor is to oversee the adjudication of claims arising out of Federal Employees

Compensation Act; particular duties at that time were to see that all the adjudicators or claims examiners carried out their normal day's work. In addition to that, train any new employees that we may have employed.

Q. In the course of that work, would you handle claims which arose from members of the Air National Guard of the United States? A. Yes, sir.

Q. What was your procedure? A. Pardon me, sir?

Q. What was your procedure for handling claims that came in from members of the Air National Guard of the United States? What was the procedure that you
275 followed in this office for handling such claims, in other words? A. Air National Guard cases are handled in the same manner as any other case. Under the Federal Employees Compensation Act we cover a multitude of occupational occupations, period. For example, office workers, professional employees of the United States Government, and Air National Guardsmen.

Specifically, we require basic reporting forms which the Bureau has prescribed and has printed up for distribution to all agencies of the Government. When these basic forms come in, we review the form to see that they are properly completed, and we proceed to adjudicate the claim for compensation under the Federal Employees Compensation Act.

Q. What are the basic forms that you refer to? Can you describe them? Do they have numbers, or anything like that? A. Particular forms?

Q. Yes. A. Yes, sir, the basic reporting forms, the injured employee himself, is form CA-1. And then, after the employee completes this, he submits this to his supervisor who in turn completes form CA-2, which is Official Superior's Report of Injury. Then, in addition to that, you may have other forms: CA-16, which provides medi-
276 cal treatment, due to the injury.

Q. Who fills out that form? A. That is the immediate supervisor or superior of the injured employee.

Q. Are there any other forms which are used in connection with National Guard claimants? A. Forms them-

selves, no. But the Bureau does require certification by the proper official as to the individual's employment at the time of injury.

Q. In the case of a claim coming from an employee of a National Guard unit, who will execute such a certificate? Is there any designated official to execute such a certificate in the normal case? A. Yes, sir. The Bureau requires that the United States Property and Disbursing Officer is the one accountable for these injury reports. In other words, we do not as a general rule buy any certification by any other officer or individual within the National Guard.

Q. Then, if I understand you, the forms are CA-1, CA-2, CA-16 and this certificate of the Property and Disbursing Officer—or would that be Property and Fiscal Officer? A. The title that we have accepted is United States Property and Disbursing Officer.

277 Q. If you were to receive those forms in a claim arising from an employee of the National Guard in one of the various states, what would be your normal action then with respect to it? How would you proceed, in other words? What is your procedure? A. Well, we had explained that before. Review the basic reporting forms as to (1) properly completed; (2), are all—In other words, the form itself is printed in such a manner that answers reflect whether or not the individual is entitled to benefits under the Federal Employees Compensation Act. In review process, or adjudication, we accept certain answers as being factual, as reported by the officer in charge of the injured employee. And we, in the adjudication process, determine whether or not the individual is entitled to benefits under Federal Employees Compensation Act.

Q. Do you utilize these forms in making that adjudication? A. Pardon me, sir?

Q. I say, do you actually utilize these particular form in making that— A. Yes, sir. The answers given are very important as to whether or not the individual has coverage or does not.

MR. PETTIBONE: I would like to take one document from the group of documents which has already previously been marked Plaintiff's Exhibit 5. So may I ask the clerk to withdraw this particular document from that group of documents.

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THE DEPUTY CLERK: Defendant's Exhibit 6 for identification.

(Department of Labor, Bureau of Employees' Compensation Form CA-25 was marked Defendant's Exhibit No. 6 for identification.)

By MR. PETTIBONE:

Q. Mr. Stasko, I am going to hand you a document which has just been marked Defendant's Exhibit No. 6 for identification. Will you look at it and state what it is, if you know. A. This is a form, CA-25, we call summary sheet. Its purpose is to record all case action within a specific case file. Its origin—in fact it is made up at the time the basic reporting forms are, and it goes along with the case file to the claims examiner for proper action.

Q. Is that a copy of the form CA-25 which relates to a specific case which you handled in your office in 1958, if you know? A. Yes, sir.

Q. Whose case does that refer to? A. Julius R. McCoy.

Q. Did you have any personal connection with the handling of the case of Julius R. McCoy? A. Yes, sir. At this time I was acting claims supervisor—claims examiner supervisor.

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Q. Did you, in the course of your employment as acting claims supervisor, review the claim of Julius R. McCoy? A. Yes, sir.

Q. Did you make any entries on the CA Form 25, a copy of which you have just identified as holding in your hand? A. Did I do what, sir?

Q. Did you make any entries on that? A. Yes, sir. My initials are in the examiner's section.

Q. Will you point out where your initials are on this form, and describe it so it will go into the record. Where on that form do you find those? A. Mine are the first set of initials, which is a small "j" and a small "s," made for expediency.

Q. And whereabouts on the sheet are these found? A. Under the heading entitled "Examiner's Findings," item number one, "Claim approved." Underneath that is "Examiner."

Q. There appear to be some other initials following your own on that line. Do you know whose initials
280 those are? A. Yes, sir. They are Mr. Diggins, John Diggins.

Q. Who was he? A. Mr. Diggins was a trainee at the time of the accident.

Q. Could you explain what you mean by "trainee"? A. A trainee is a new employee that is hired. After passage of examination, the Federal Government hires the individual and assigns him to the agency in need of this particular type of individual's talent. Mr. Diggins came aboard. I think he was aboard approximately a month or two. And in the process of his duties he was assigned primary cases to examine. At the completion of his examination he would submit these to a supervisor for a review and discussion as to points of workmen's compensation, principles he must be familiar with in adjudicating claims.

Q. Who was his supervisor? A. I was, sir.

Q. Did you supervise or review the work which he did in connection with this particular claim of Julius R. McCoy? A. Yes, sir. This is signified by my initials right beside his, would indicate his supervisor had reviewed his work.

Q. With respect to this claim of Julius R. McCoy, did you take any specific action? A. Other than exam-
281 ining the basic forms, no, sir.

Q. Well, what final action did you take in the matter? First of all, let me ask you: Do you take final action in the matter? A. Adjudication of claims, final

action could be a misnomer in itself, towards the various steps of adjudication and administrative process we go through. But in this particular case, I would say final action was taken, yes, sir.

Q. Did you adjudicate the claim, in other words? A. Yes, sir.

Q. And what adjudication did you make of the claim? A. The actual adjudication was to review the basic reporting forms, CA-1, -2, and to agree that the individual injured, Mr. McCoy, was in the performance of duty at the time of injury.

Q. In reaching that conclusion did you consider any evidence of any kind, either verbal, by witness, or in documentary form, of other than these forms which you have enumerated? A. No, sir.

Q. So that your determination was based solely on those particular forms? A. It has to be. That is a requirement of the Bureau. Strictly on the case file record.

Q. As a result of your adjudication, you know whether or not any payments were made to Julius R. McCoy? A. No compensation payments were awarded. But there were medical payments. In other words, payment of medical bills incurred as a result of the accident. No compensation was paid.

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Q. Does the document which you hold indicate what those payments were? A. Yes, sir.

Q. Would you so state, then, to the Court. A. There was a payment of $50 to a Dr. R. H. Pilgram, P-i-l-g-r-a-m. There was a second payment, $37.50, to the Frederick Memorial Hospital. Those are the only two payments made in this case.

Q. Was there any hearing held in conjunction with the adjudication of this claim? A. No, sir.

Q. Were any witnesses called? A. No, sir.

MR. PETTIBONE: No further questions, Your Honor.

MR. GALIHER: No questions, Your Honor.

THE COURT: Then I take it that it is agreeable to both sides for this witness to be finally excused?

MR. PETTIBONE: It is, Your Honor.

THE COURT: You are excused.

283 THE WITNESS: Thank you, ma'am.

(Witness stepped down.)

MR. PETTIBONE: That will complete the defendant's case, except for the introduction of these various regulations which we have talked about previously. In addition to those which the plaintiff still has pending to offer, we also have some. So, if the Court cares to recess at this time and convene later, we will undertake to work out the details of those documents to present at some later time.

THE COURT: Very well. Then we will recess until about 1:45.

MR. GALIHER: May Colonel Kilkowski be excused?

MR. PETTIBONE: I will not need him further.

THE COURT: You are excused, Colonel.

(Thereupon, at 12:16 p.m., a recess was taken.)

AFTERNOON SESSION

MR. GALIHER: May it please the Court, I would like to introduce parts of Exhibit 15.

THE COURT: Would you speak just a little louder. This air conditioner drowns your voice out.

MR. GALIHER: I would like to introduce at this time a portion of Plaintiffs' Exhibit No. 15, marked for identification No. 15, which is what I referred to before the

284 luncheon recess as being a National Guard regulation and Department of the Army regulation dealing with accounting clerks and caretakers which was in effect at the time of the case of Holly versus United States.

THE COURT: You said you were offering a part of it?

MR. GALIHER: Yes; I will read it to you, if I may. It is only a short part, right on the first page, Your Honor.

THE COURT: Very well. Admitted.

(Plaintiffs' Exhibit No. 15 for identification was received in evidence.)

THE COURT: You have examined this, Mr. Pettibone, have you not?

MR. PETTIBONE: Yes, we have, Your Honor.

MR. GALIHER: (Reading)

"Authority. Accounting clerks and caretakers referred to in these regulations are employees authorized under the provisions of section 90, National Defense Act, for the administration and care of materiel, armament, vehicles, and equipment provided for the National Guard and used solely for military purposes. The Secretary of the Army has delegated to the several adjutants general of
285 States, Territories, and the District of Columbia, authority to employ, fix rates of pay, establish duties and work hours (not to exceed 40 hours per week), and to discharge employees within the purview of this regulation; subject to the provisions of law and such instructions as may from time to time be issued by the Chief, National Guard Bureau."

I would like to introduce this and ask Your Honor's permission to withdraw it so that I may make a photostatic copy of what I have just read to you, which I will then return to the Court. I understand this is the only document presently available.

THE COURT: All right.

MR. GALIHER: And I will also give Mr. Pettibone a copy.

THE COURT: Very well.

MR. GALIHER: And next, certain provisions of NGR 75-16, which I will call to Your Honor's attention—was marked for identification as No. 16, I think. This was after the one that I have just shown you. This was in effect when I think the case of Wendt, W-e-n-d-t, versus United

States was decided, which has already been mentioned to Your Honor.

"Purpose. The purpose of these regulations is to outline the qualifications, duties, rights and obligations of the following personnel (hereinafter referred to collectively
286 as 'National Guard civilian personnel'); administrative assistants; accounting clerks, maintenance personnel; range-keepers; and administrative, supply and maintenance technicians, and to prescribe the procedure for the payment of these individuals.

"2. Authority. National Guard civilian personnel referred to in these regulations are employees authorized under the provisions of Section 90, National Defense Act, for administrative and accounting duties, maintenance, repair and inspection of materiel, armament, vehicles, and equipment provided for the National Guard and used solely for military purposes. The Secretary of the Army has delegated to the adjutants general of the several States, Territories, Puerto Rico, and the District of Columbia, the authority to employ, fix rates of pay, establish duties and work hours (a minimum of 40 hours per week), supervise, and discharge employees within the purview of these regulations; subject to the provisions of law and such instructions as may from time to time be issued by the Chief, National Guard Bureau. (32 U.S.C.A. 42 and 42a; . . .)"

The 42 is now 708, which has been introduced into evidence, the section dealing with caretakers and clerks, which I have already referred to and which I would like to refer
287 to again when I make some closing remarks after all of the documents are in.

I think that all I will need to leave is just the first page of that, Your Honor, instead of all this other material, which I don't think you need.

And, finally, Your Honor, I would like to have marked—it has been marked No. 17 for identification. I wish to offer certain parts of it, which I will call to Your Honor's attention, just as I have done in the case of the other documents.

And I would likewise ask permission to withdraw that and have copies made of that.

THE COURT: Do I understand you are going to do each of these, 15, 16 and 17, the same way?

MR. GALIHER: Not 16.

THE COURT: All right.

MR. GALIHER: I take that back. I would like to do that the same way too, please.

Would Your Honor permit me to read from that, if you please?

THE COURT: Certainly.

MR. GALIHER: This is captioned Air National Guard Regulation, Department of the Air Force, Washington, 20 December 1945. ANGR 40-01.

Under "Purpose":

"This Regulation provides a manning guide for
288 the Air National Guard civilian personnel program and establishes policies and procedures applicable to Air National Guard civilian personnel.

"2. Policy: A. Air National Guard civilian personnel shall be utilized to effect maximum efficiency in administration, supply, operations, training, and maintenance of the Air National Guard.

"b. Air National Guard civilian personnel must be federally recognized members of the Air National Guard of the State, Territory, Puerto Rico, or the District of Columbia. . . .

"c. Officers will not be appointed to Air National Guard civilian personnel positions authorized for airmen, nor will airmen be appointed to positions authorized for officers.

"d. The authorized grade and position titles may not be altered or changed.

"f. Officer type air technician positions may not be transferred or changed without prior approval of the Chief, National Guard Bureau.

"g. Air National Guard technician positions will not be transferred to Army National Guard units.

"h. Air National Guard civilian personnel may not accept outside employment which interferes or conflicts with the performance of their Air National Guard civilian
289 duties.

"i. Air National Guard civilian personnel will occupy the T/O vacancy most comparable to their civilian position."

"k. Officers required to meet a Federal recognition board should not be employed prior to receipt of Federal recognition, and any individual if so employed accepts such employment at his own risk. Officers exempted from meeting a Federal recognition board may be employed and paid from the date the individual is appointed. Airmen may be employed upon completion of the oaths of enlistment.

"l. The authority governing matters pertaining to Air National Guard civilian personnel is contained in this regulation and will be quoted as reference in special orders and other official action."

Under "Authority:"

"a. Basic authority for the employment of Air National Guard civilian personnel is contained in Section 90, National Act, . . .

"b. Authority is delegated to the adjutants general of the several States, Territories, Puerto Rico, and the District of Columbia, to employ, fix rates of pay, establish work hours (a minimum of 40 hours per week), supervise, and discharge employees within the purview of this
290 regulation; subject to the provisions of law and such instructions as may be subsequently issued by the Chief, National Guard Bureau."

There is next a regulation, Your Honor, which I am not offering but which I want to mention because if I don't

mention it, I am sure Mr. Pettibone will, and that says that "Air National Guard civilian personnel are considered to be employees of the State, Territory, Puerto Rico, or the District of Columbia."

The reason I do not offer that is because that is contrary to the evidence in this case and contrary to the uncontradicted decisions holding that unit caretakers and clerks in the category of Captain McCoy are employees of the United States.

THE COURT: You referred to this as a regulation but you have not identified it.

MR. GALIHER: This is simply another number in the document that I am reading from, called "4," under "Status," Your Honor.

I am not offering it. I say it is a self-serving statement of the Air National Guard concerning the status of Air National Guard civilian personnel and contrary to the uncontradicted law of the land, which I will refer to more in detail later on.

291 "5. For the purpose of this Regulation:

"'Air National Guard civilian personnel' means any and all civilians employed by the several States, Territories, Puerto Rico, and the District of Columbia, permanent or temporary, male or female, supported wholly or in part by Federal funds appropriated for that purpose, including but not limited to the following:"

And then they go along and say "Air Technician" and explain what that is; "Temporary employees"; "Temporary air technician." They explain next an "Air National Guard civilian detachment," what they mean by "Man days," "Man months," "Man years."

They have a section here dealing with "Air National Guard Civilian Man Months and Funds." They prescribe salary and wage schedules for the Air National Guard

civilian personnel as published by the Chief, National Guard Bureau, and that is set out here in detail.

They have a section which covers Air National Guard civilian personnel attending service or technical schools. That is number 10, subsection (6).

They have a subsection (7), of the same Section No. 10, covering air technicians who cannot receive government mess and quarters while attending school. They are to be given certain cash sums prescribed, based on a day to day basis.

292 They deal with government transportation, reimbursable expenses, even taxi fares, goverment autos.

Then they have a Section 11 providing that the pay of National Guard maintenance employees with less than journeyman skill—"NGM," I assume that is what it means—this provision:

"a. The Army-Air Force Wage Board locality pay scales used for air technicians are based upon the employee having 'journeyman' level of skill and ability. Therefore, employees with less than journeyman level of skill and ability are not entitled to the rates of pay listed in subject scales."

Section 1 2provides for Social Security benefits for these civilian personnel, and this reads:

"Air National Guard civilian personnel are eligible to be covered by the provisions of the Social Security Act, as amended, unless such personnel are under an existing retirement system."

That is in line, I submit, with the testimony which has been offered into evidence.

The next section deals with—testimony about which there
pensation Commission. Permits compensation to be
293 paid for injuries or death incurred by Air National Guard Civilian personnel in the performance of their official duties.

They have a provision applying to civilian personnel, which starts with Section Roman numeral IV, called "Step Advancement," and continues with several sections as to how advancement can take place in the job, how promotions can take place.

They have a section number 23 which provides that:

All personnel will attend field training in their military status. Personnel will not remain on duty at their home station unless specifically authorized by the Chief, National Guard Bureau.

They have Section 24, which provides for attendance at Military and/or Civilian Service or Technical Schools, providing that they will attend in their military status unless specifically authorized to attend in civilian status by the Chief, National Guard Bureau.

Section 25, I call to Your Honor's attention, dealing with the utilization of temporary air technicians:

"a." in part, reads:

"The use of temporary employees, paid from funds authorized for pay of air technicians, is not authorized without approval of the National Guard Bureau, . . ."

and so forth.

294 Number 26 provides:

"Air National Guard Civilian Personnel Manning Guide. Attachment No. 1 to this Regulation is the Air National Guard Civilian Personnel Manning Guide. Employment of civilian personnel listed in this guide will be governed by directives promulgated from time to time by the Chief, National Guard Bureau."

This is already in evidence, Your Honor, as No. 3, and I have called Your Honor's attention to the pertinent parts of that.

I believe that covers the sections, Your Honor, that I wanted to call to Your Honor's attention.

Thank you.

MR. PETTIBONE: May I inquire: Are you offering the whole regulation?

MR. GALIHER: No. I am offering the regulations that I specifically said I was offering. Those are the ones that I have read to Your Honor, with the exception of Number 4, which I mentioned to Your Honor but stated specifically I was not offering it into evidence.

THE COURT: You said earlier that you were going to have a photostat or something to identify those?

MR. GALIHER: Yes, if I may, please.

THE COURT: All right.

MR. PETTIBONE: If the Court please, in view of
295 the fact that the plaintiff has read or paraphrased at some length many portions of these regulations, I would now move that the entire regulation be introduced into evidence, rather than just those single portions which the plaintiff has selected.

MR. GALIHER: The part that I have indicated I object to is contrary to law, Your Honor. And, as I said, it was a self-serving document.

THE COURT: Well, you have offered what you want in. Now, if I understand his motion, it is that he wants all the rest of the regulations in.

MR. GALIHER: That is right.

THE COURT: You object to nothing that he wants in except this 4, is it?

MR. GALIHER: Well, there are several others, if he is going to offer them all, that I object to. I will be glad to point them out, Your Honor.

The first one I told you about I have objected to is number 4, and I suppose, to pass on it, Your Honor would like to read it. I have stated my reasons for that, being contrary to the law in the case of Holly vs. United States, Elmo vs. United States, Duncan vs. United States, Courtney vs. United States, and Wendt vs. United States, the citations of which I have given to you.

THE COURT: What are the others which you have
296 objected to, if any?

MR. GALIHER: All right. I wonder if I might have that back? I am sorry we don't have more copies.

THE COURT: I have overruled your objection before, which means that 4 is received as evidence offered by the defendant.

MR. GALIHER: I don't believe I have any other objections, Your Honor.

THE COURT: Very well. Then the rest of that document, Plaintiff's 17, will be received on behalf of the defendant.

COLONEL PRINCE: Your Honor, I have eight regulations here I would like to have marked for identification at this stage.

THE DEPUTY CLERK: Defendant's Exhibit No. 7 for identification.

(Air Force Regulation 45-2 was marked Defendant's Exhibit No. 7 for identification.)

THE DEPUTY CLERK: Defendant's Exhibit No. 8 for identification.

(Air Force Regulation 20-12 was marked Defendant's Exhibit No. 8 for identification.)

THE DEPUTY CLERK: Defendant's Exhibit 9 for
297 identification.

(Air National Guard Regulation No. 50-01 was marked Defendant's Exhibit No. 9 for identification.)

THE DEPUTY CLERK: Defendant's Exhibit 10 for identification.

(Air National Guard Regulation No. 55-19 was marked Defendant's Exhibit No. 10 for identification.)

THE DEPUTY CLERK: Defendant's Exhibit 11 for identification.

(Air Force Regulation No. 123-5 was marked Defendant's Exhibit No. 11 for identification.)

THE DEPUTY CLERK: Defendant's Exhibit 12 for identification.

(Air National Guard Regulation No. 36-05 was marked Defendant's Exhibit No. 12 for identification.)

THE DEPUTY CLERK: Defendant's Exhibit 13 for identification.

(Air National Guard Regulation No. 36-4 was marked Defendant's Exhibit No. 13 for identification.)

THE DEPUTY CLERK: And Defendant's Exhibit 14
298 for identification.

(Air National Guard Regulation No. 36-02 was marked Defendant's Exhibit No. 14 for identification.)

THE COURT: The Government didn't give any number to the balance of this 17. I guess that should have a number.

COLONEL PRINCE: Why don't we, then, Your Honor, number that Defendant's Exhibit 15.

THE COURT: And Defendant's 15 will be so much of Plaintiff's 17 as was not introduced by the plaintiff.

(Air National Guard Regulation No. 40-01 was marked Defendant's Exhibit No. 15 for identification.)

MR. PETTIBONE: Thank you, Your Honor.

COLONEL PRINCE: At this point, the defendant offers into evidence Defendant's Exhibit 7 for identification, which is a copy of Air Force Regulation 45-2, dated 13 April 1949. Copies of this particular document have previously been furnished to counsel for the plaintiff.

MR. GALIHER: We have no objection to this document, Your Honor.

THE COURT: Very well. Admitted.

(Defendant's Exhibit No. 7 for identification was received in evidence.)

299 COLONEL PRINCE: Defendant offers into evidence Defendant's Exhibit 8 for identification, a copy of

Air Force Regulation 20-12, dated 9 November 1953. Copies of this document have also been furnished to plaintiff.

MR. GALIHER: Your Honor, the only objection we have to this document is contained in Regulation number 5 b., which has to do with the same objection that I made to the other document, which is contrary to law.

THE COURT: Very well. I will overrule your objection. Defendant's 8 is admitted.

(Defendant's Exhibit No. 8 for identification was received in evidence.)

COLONEL PRINCE: Now, Your Honor, with regard to Defendant's Exhibits 9 through 14 for identification, we are embarrassed to find that we do not have such copies of these regulations at this point. And in the event that they are admitted, we would like permission to withdraw them and prepare copies and furnish counsel for the plaintiff with those.

THE COURT: Well, have you shown them to—

COLONEL PRINCE: No, we have not, Your Honor, I intend to do this right now.

THE COURT: Very well.

(Documents were handed to Mr. Galiher.)

300 MR. GALIHER: Your Honor, there are certain parts of this which we have no objection to, but there are several parts where this constitutes a legal argument just as would be in a brief. For example, "Except when ordered to active Federal service by competent authority, the Air National Guard is not legally under the command jurisdiction of officers of the United States Air Force; neither is the Air National Guard of a State legally subject to orders from an Air National Guard officer from another state."

Those are points Your Honor has to resolve. We object to their regulation so far as these legal arguments are contained therein, as well as, for example:

"The efficient and effective training of the Air National Guard while under State control requires the highest degree

of cooperation and coordination between all echelons of command regardless of State boundaries or other legal barriers, in order to properly train the Air National Guard for its Federal mission."

Obviously, material of that sort, Your Honor, is what we would certainly call in law dicta, which has nothing to do with regulations as such. So we certainly object to those.

THE COURT: Which one is that in? 9?

MR. GALIHER: This is in No. 9, 6c and d, I have
301 just read from.

THE COURT: I will take a look at it.

You go ahead, though, with anything else.

MR. GALIHER: Go ahead with the others, since they have just been handed to us, Your Honor.

THE COURT: You have finished with this?

MR. GALIHER: I think that is all. I have had to go through it very hurriedly.

Your Honor, it will take us five or ten minutes to look at this. I don't know whether they have any other documents. We have been handed some here. Would there be some other way of resolving this so we can save Your Honor's time?

THE COURT: You have other documents you are going to offer besides these they are looking at?

COLONEL PRINCE: No, we don't have any others, Your Honor.

MR. GALIHER: Then we will look at those now.

THE COURT: How long will it take you? About ten or fifteen minutes?

COLONEL PRINCE: I would say not longer than ten minutes, Your Honor.

THE COURT: All right. We will take a recess for ten minutes.

(Thereupon, at 2:29 p.m., a recess was taken.)

302 AFTER RECESS

MR. GALIHER: We have no objection to the other documents, Your Honor. Some of them have underlining and so forth. I assume they don't mean to draw particular emphasis to that; particularly since they only had one document, we are making no objection—one copy.

THE COURT: You would like to withdraw this 6c and 6d, or do you stand on it?

COLONEL PRINCE: 6c and 6d, Your Honor?

THE COURT: That is Defendant's 9. That was that part that Mr. Galiher objected to.

COLONEL PRINCE: Did I understand Mr. Galiher—You are still maintaining your objection to this one?

MR. GALIHER: The part the Judge has before her.

THE COURT: Only to 6c and 6d in No. 9.

COLONEL PRINCE: Yes, Your Honor. Yes, if it please the Court, we intend to stand on our offer as to the entire regulation.

THE COURT: Well, I think I will admit the entire regulation. Of course, we all know that the Army or the Air Force is not a legislative body, and that it may make only such regulations as are authorized by law.

(Defendant's Exhibit No. 9 for identification was received in evidence.)

303 COLONEL PRINCE: Yes, ma'am.

I think maybe for the sake of the record, if it please the Court, at this time that I should make a formal offer of all of these Defendant's Exhibits, 9 through 14 for identification.

THE COURT: Yes. They are all admitted.

(Defendant's Exhibits Nos. 10 through 14 for identification were received in evidence.)

COLONEL PRINCE: Thank you, Your Honor.

THE COURT: And I did admit 15?

THE DEPUTY CLERK: Yes, Your Honor.

(Defendant's Exhibit No. 15 for identification was received in evidence.)

THE COURT: Is that all.

MR. PETTIBONE: That is all, Your Honor, for the defendant.

MR. GALIHER: That is all for the plaintiffs, Your Honor, except that if I may be permitted to make some observations at this time, which I think perhaps would be of help to Your Honor, I would appreciate the opportunity of doing so.

Plaintiff's Exhibit 1. Local Flight Clearance

LOCAL FLIGHT CLEARANCE

STATION: MARTIN AIRPORT BALTIMORE, MARYLAND — DATE: 22 Oct 56

TYPE A/C: T-33 — A/C NO.: 35966 — MISSION: O

DUTY SYMBOL	NAME AND INITIALS	RANK OR GRADE	SERIAL NO.	HOME STATION
P	McCoy J P	Capt	A0278[illegible]	[illegible]TP
X	CHALMERS, D A	1/LT	23316272	PIKESVILLE MD

(List additional passengers on reverse side)

ETD	ETA (Home base)	HOURS OF FUEL	AUXILIARY BASE OF 1ST INTENDED LANDING
1000	1200	1+30	—

FORM "F" FILED AT: NR — DATE FILED (Day, month, year): —

WEATHER IS FORECAST TO REMAIN VFR FOR THE DURATION OF THIS FLIGHT. I CERTIFY THAT I AM FAMILIAR WITH LOCAL AND AIR FORCE REGULATIONS AFFECTING THIS FLIGHT AND THAT THIS FLIGHT WILL BE CONDUCTED IN ACCORDANCE WITH SUCH REGULATIONS.

CLEARANCE AUTHORITY: [illegible] McCoy — PILOT'S SIGNATURE: [illegible]

ACTUAL DEPARTURE: 1007 — ACTUAL ARRIVAL:

REMARKS:

TAKE OFF DISTANCE 7100'
TIP TANK FUEL 0
3200'

I certify that this flight has been briefed.
I A W Wing Regulation 55-6 Dated 25 May 54.

[signature]

AF FORM 28 MAR 49 113

Plaintiff's Exhibit 2. Flight Order Number 105

OFFICE OF THE OPERATIONS OFFICER

104th Fighter Intercepter Squadron
Maryland Air National Guard
Baltimore, Maryland

20 May 1958
(Date)

FLIGHT ORDER)
NUMBER 105)

1. The fol CR/M this Hg, WP on/about 20 May 1958 in acft as indicated below from Martin Airport, Baltimore, Maryland, to destination specified below, CIPAP, for purpose of maintaining flying proficiency and upon comp of flt, will return to proper duty station on/about 20 May 1958.

A/C Type & No.	Grade	Name	AFSN	Destination	Duty
T-33A 5966	Capt.	J. R. McCoy	AO-784056	Local	P
T-33A 5024	Major	J. F. R. Scott	AO-528560	Cleveland	IP
	Capt.	T. L. Oelker	AO-827925	Cleveland	P

BY ORDER OF THE COMMANDER:

Official:

JOSEPH J. MAISCH, JR.
Joseph J. Maisch, Jr.
MAJOR, Md. ANG
Operations Officer

JOSEPH J. MAISCH, JR.
MAJOR, Md. ANG
Operations Officer

Plaintiff's Exhibit 3

CIVILIAN PERSONNEL MANUAL

1 MARCH 1958

DEPARTMENT OF THE AIR FORCE • NATIONAL GUARD BUREAU

ANG MANUAL
40–01

DEPARTMENT OF THE AIR FORCE
WASHINGTON, *1 March 1958*

Foreword

The Air National Guard Civilian Personnel Manual is issued to provide staff and operating personnel with a convenient reference to the titles, grade, job number and duties of civilian personnel in the Air National Guard. Provisions are also included for the submission of recommendations for new or revised positions, grades and titles.

Provisions of this manual will govern all Air National Guard civilian employees, including those employed on a temporary hourly rate basis except those hired wholly from State or service contract funds, and will become effective as of 1 April 1958.

All Air National Guard civilian personnel will be permitted access to the contents of this manual and will be fully acquainted with the duties and responsibilities of their positions.

Recommendations or suggestions for the improvement of procedures or position descriptions of this manual are encouraged. Comments may be forwarded to National Guard Bureau, NG–AFOTP, Washington, D. C.

BY ORDER OF THE SECRETARY OF THE AIR FORCE:

OFFICIAL:

JAMES E. BARBER
Colonel, NGB
Executive

EDGAR C. ERICKSON
Major General
Chief, National Guard Bureau

DISTRIBUTION:
1 ea AG
1 ea USP&FO
4 ea Flying Detach
1 ea Non-Flying Detach

The listing below is in numerical order according to job numbers. The status indicates the position can be occupied by Officer (O), Warrant Officer (WO)*, Airman (A), Female (F), and Non-Guardsman (X). The job title and career field title indicate the technician job title and corresponding Air Force career field and title. These are the new position numbers and titles; for the conversion see Section II, Paragraph 32.

*An airman who is appointed warrant officer may be retained in his airman type position. A warrant officer will not be hired direct into airman type positions except into the position of Aircraft Maintenance Chief, Job Number 43-10.

Job No.	Status	Job Title	Career Field and Title
00-00	O	Base Detachment Commandr	00 Commanders
00-01	O	Base Detachment Commander	00 Commanders
00-02	O	Base Detachment Commandr	00 Commanders
00-03	O	Training Site Supervisor	00 Commanders
00-04	O	Training Site Supervisor	00 Commanders
14-00	O	Operations Supervisor	14 Opns & Tng
14-01	O	Flying Training Instructor	14 Opns & Tng
23-00	O	Intelligence Photo Radar Supv	23 Photographic
23-10	A	Photo Technician	23 Photographic
23-11	A	Photo Tech and Repairman	23 Photographic
23-12	A	Photo Lab Technician	23 Photographic
23-13	A	Camera Repairman	23 Photographic
27-10	A	Air Operations Specialist	27 Air Traffic Cont & Wng
27-11	A	Air Operations Technician	27 Air Traffic Cont & Wng
30-00	O	Communications Supervisor	30 Comm & Electronics
30-01	O	Radar Station Commander	30 Comm & Electronics
30-02	O	Radar Station Commander	30 Comm & Electronics
30-03	O	Tactical Control Sq Commander	30 Comm & Electronics
30-04	O	Tactical Control Gp Commander	30 Comm & Electronics
30-05	O	Comm & Electronics Supervisor	30 Comm & Electronics
30-10	A	Radio-Radar Maint Supt. (Ground)	30 Radio-Radar Systems
30-11	A	Radar Maint Tech (Airborne)	30 Radio-Radar Systems
30-12	A	Radar Mechanic (Airborne)	30 Radio-Radar Systems
30-14	A	Radar Maint Technician (Gnd)	30 Radio-Radar Systems
30-15	A	Radar Mechanic (Ground)	30 Radio-Radar Systems
30-17	A	Radio Maint Tech (Airborne)	30 Radio-Radar Systems
30-18	A	Radio Mechanic (Airborne)	30 Radio-Radar Systems
30-20	A	Radio Maintenance Tech (Gnd)	30 Radio-Radar Systems
30-21	A	Radio Mechanic (Ground)	30 Radio-Radar Systems
30-23	A	Communications Technician	30 Radio-Radar Systems
32-10	A	Fire Control Superintendent	32 Fire Control Systems
32-11	A	Fire Control Technician	32 Fire Control Systems
32-12	A	Fire Control Specialist	32 Fire Control Systems
34-10	A	Flight Simulator Technician	34 Training Devices
34-11	A	Flight Simulator Specialist	34 Training Devices
34-12	A	Synthetic Trainer Technician	34 Training Devices
42-10	A	Hydraulic Technician	42 A/C Accessories Maint
42-11	A	Propeller Technician	42 A/C Accessories Maint
42-13	A	Instrument Technician	42 A/C Accessories Maint
42-14	A	Electronic Fuel Cont Tech	42 A/C Accessories Maint
42-15	A	Electrical Technician	42 A/C Accessories Maint
42-16	A	Electronic Fuel Cont. Specialist	42 A/C Accessories Maint
43-00	*O	Maintenance Supervisor	43 Maint & Engineering

Job No.	Status	Job Title	Career Field and Title
43-10	O-WO-A	Aircraft Maintenance Chief	43 Aircraft & Eng Maint
43-11	A	Chief Maintenance Inspector	43 Aircraft & Eng Maint
43-12	A	Maintenance Inspector	43 Aircraft & Eng Maint
43-13	A	Aircraft Maint Technician	43 Aircraft & Eng Maint
43-14	A	Senior Aircraft Mechanic	43 Aircraft & Eng Maint
43-15	A	Aircraft Mechanic	43 Aircraft & Eng Maint
43-16	A	Jet Eng Maint Supt	43 Aircraft & Eng Maint
43-17	A	Jet Engine Technician	43 Aircraft & Eng Maint
43-18	A	Jet Engine Mechanic	43 Aircraft & Eng Maint
43-19	A	A/C Dock Superintendent	43 Aircraft & Eng Maint
43-20	A	Flight Engineer Technician	43 Aircraft & Eng Maint
45-10	A	Production Scheduling Tech	45 Production Control
46-10	A	Munitions & Weapons Tech	46 Munitions & Wpns Maint
46-11	A	Munitions and Weapons Spec	46 Munitions & Wpns Maint
47-10	A	Motorized Equip Superintendent	47 Motorized & Misc Maint
47-11	A	Mechanic (General)	47 Motorized and Misc Maint
47-12	A	Ind Pow & Support Equip Rpmn	47 Motorized & Misc Maint
47-13	A	Vehicle Operator (Mechanic)	47 Motorized & Misc Maint
53-10	A	Machinist	53 Metal Working
53-11	A	Sheet Metal Technician	53 Metal Working
53-12	A	Welder	53 Metal Working
55-00	O	Instals Facilities Supv	55 Instals Engineering
57-10	A	Crash/Fire Rescue Specialist	57 Firefighting
58-10	A	Parachute Rigger & Repairman	58 Fabric, Leather & Rubber
59-10	A	Boat Master	59 Marine
59-11	A	Marine Engineer	59 Marine
64-00	O	Supply Supervisor	64 Supply
64-01	O	Assistant Supply Supervisor	64 Supply
64-10	A	Editing & Doc Control Tech	64 Supply
64-11	A	Supply Records Specialist	64 Supply
64-12	A	Refueling Unit Operator	64 Supply
64-13	A	Warehouse Specialist	64 Supply
64-14	A	Warehouse Specialist (Apr)	64 Supply
64-15	A	Petroleum Specialist	64 Supply
64-16	A	Clerk Parts (Maintenance)	64 Supply
64-17	A	Purchasing & Contracting Spec	64 Supply
64-18	A	Warehouse Superintendent	64 Supply
64-19	A	Inventory and Inspec Spec	64 Supply
64-20	A	Supply Records Superintendent	64 Supply
64-21	A	Org Supply Superintendent	64 Supply
64-22	A	Org Supply Technician	64 Supply
64-23	A	Clerk Parts (Maintenance)	64 Supply
64-24	A	Org Supply Specialist	64 Supply
64-25	A	Transportation Specialist	64 Supply
64-26	A	Supply Specialist (Apr)	64 Supply
67-10	A	Accounting Specialist	67 Finance, Acctg & Auditing
67-11	A	Finance Specialist	67 Finance, Acctg & Auditing
68-00	O	Accounting Supervisor	68 Comptroller
68-01	O	Accounting Supervisor	68 Comptroller
68-02	O	Accounting Supervisor	68 Comptroller
70-01	O	Administrative Supervisor	70 Administration Services
70-02	O	Administrative Supervisor	70 Administration Services
70-03	O	Administrative Supervisor	70 Administration Services
70-04	O	Administrative Assistant (State)	70 Administration Services
70-05	O	Administrative Asst. (State)	70 Administration Services
70-06	O	Administrative Asst. (State)	70 Administration Services
70-11	A	Administrative Technician	70 Administration

Section I

GENERAL PROVISIONS

1. Format

This manual is issued in loose-leaf form to facilitate reference and current maintenance. Changes to this manual will be effected by rescission, additions, and deletions of specific pages or of entire sections, based on the extent of change to be effected.

2. Maintenance of Manual

a. Copy or copies of this manual will be maintained by each office listed on the distribution. Any changes will be forwarded by numbered transmittal sheets and inserted in the appropriate space within the manual.

b. The following internal distribution is recommended:

(1) Each major functional area at a flying base should maintain a copy of the manual—supply, maintenance, operation and administration. The other functional areas will consult the administrative copy.

(2) Each non-flying detachment not located on or not fully dependent on a flying base should maintain a copy to include Headquarters State Air National Guard, electronics and communications units or detachments and other detachments that "need to know" may request copies from National Guard Bureau, AFOTP.

3. Delegation of Authority

The authority of the National Guard Bureau to regulate the employment and rates of compensation is contained in Department of the Army General Order 96, dated 9 November 1951, subject, "Delegation of Authority for the Employment and Fixing of Salaries for All Caretakers and Clerks in the National Guard Bureau."

4. Policy

a. It is the policy of the National Guard Bureau that positions will be classified in an orderly manner to provide a systematic basis for salary or wage determination, as well as for the application of the various processes of air technician personnel management and administration. This policy, applied within the framework of governing laws and regulation, will facilitate the equal treatment within each classification and pay category of employees performing comparable work.

b. In order that this policy may be made operative, it is necessary that pay rates bear a direct relationship to the level of responsibility and qualification required for the work performed. Through a process of job evaluation both National Guard Classified (NGC) and National Guard Maintenance (NGM) positions are graded to provide for the equitable application of the appropriate salary or wage schedules.

c. To provide for effective administration of the program, the classification structure will be maintained through periodic manpower management surveys and desk audits of positions.

5. Responsibility

a. Adjutants general of various States, Territories, Puerto Rico or the District of Columbia will be responsible for:

(1) Insuring that the requirements and policies of the Air National Guard position classification program are followed at all air technician detachments.

(2) Furnishing recommendations, suggestions, and information to the National Guard Bureau on matters pertaining to clas-

sification standards, or on policies, techniques, and procedures affecting the position classification program.

(3) Maintains contact with the Civilian Personnel Office at nearest military installation and assists him in gathering information necessary for proper adjustment of the locality pay schedule.

b. The base detachment commander or senior air technician will be responsible for:

(1) Implementing and maintaining the position classification program as a means to facilitate the personnel management process in the accomplishment of the air technician detachment mission.

(2) Furnishing the State adjutants general with information, suggestions, or recommendations pertinent to classification policies, techniques, and procedures affecting the position classification program.

(3) Promoting the position classification program and assuring its understanding and implementation by supervisors and all employees.

(4) Keep current on the standard pay rates in their locality and advise the adjutant general of material changes. Maintain close coordination with the Civilian Personnel Office at the nearest military installation.

6. Categories of Positions

There are two major categories of positions in the National Guard Air Technician Program which are the National Guard Classified (NGC) type and the National Guard Maintenance (NGM) type.

a. National Guard Classified Type Positions (NGC). This type of category is characterized by administration, clerical, certain supervisory and professional type positions. Numerical designations of the grade are the same as those in the General Schedule of Employees of the United States Civil Service. The National Guard Bureau is guided by the Classification Act of 1949 and pay rates for this category are controlled by Congressional action.

b. National Guard Maintenance Type Positions (NGM). This type of category is characterized by trade, craft, maintenance, and labor type positions. These positions are similar to United States Civil-Service Wage Board positions and pay rates are adjusted by periodic surveys conducted by the Army-Air Force Wage Board. The following pay rates are included in this category classification:

(1) *National Guard Maintenance (NGM).* Technically skilled positions primarily concerned with the accomplishment of specific tasks and duties related to crafts, trades, maintenance of equipment and physical labor. The employees in these positions accomplish tasks and duties as directed by supervisory personnel.

(2) *National Guard Maintenance—Leader (NGM–L).* Technically skilled positions in which the employees exercise responsibility for the work of the positions stated in (1) above, and participate in the accomplishment of assigned duties and tasks.

(3) *National Guard Maintenance—Supervisor (NGM–S).* Technically skilled positions primarily concerned with direct supervision of the duties and tasks assigned to the employees in positions (1) and (2) above. Incumbents of these positions must be qualified to perform the work assigned to the employees under their supervision.

7. Use of Manual

A copy of this manual will be available for review and reference by supervisors and by employees. Ready access to the manual is essential for an understanding by Air National Guard civilian and military commanders of the responsibilities of Air National Guard civilian personnel.

1 March 1958

ANGM 40-01
Funct. Code: 80010
Status: Revised
Date: Sept 57

MAINTENANCE SUPERVISOR

Grade: NGC-11
Job Number: 43-00

I. NATURE AND PURPOSE OF WORK:

A. Introduction:

The position is located in the Maintenance Division of an Air Technician Detachment. The incumbent is responsible for coordination, supervision and control within the maintenance division for aircraft maintenance, (field and organizational type), electronics, motor vehicle and support equipment. Incumbent will maintain proper administrative practices when carrying out his responsibilities, using all accepted management principles.

B. Duties:

1. Supervises the Production Control Section to assure that all activities of maintenance are planned and coordinate properly. Arranges for work assignments and deadlines on priority jobs in coordination with production control.

2. Will supervise the Quality Control activity to assure that the section complies with all technical orders and similar directives on aircraft maintenance, inspections, and like activities.

3. Establishes, directs, and administers policies and procedures for all maintenance functions to include: electronics, electrical, hydraulics, machinist, welder, instruments, auxiliary hangar equipment, engine shop, motorized equipment, etc.

4. Advises or assists superintendents of the various maintenance areas in the more difficult technical problems involving supply, maintenance, repair, modification and storage. Recommends actions regarding requisitions and disposition of property.

5. May conduct a school or training class for the purpose of training present or future superintendents in the technical administrative problems involving the various functions of management.

6. Is responsible for ground safety, fire and crash rescue as concerns the Maintenance Division.

7. Responsible for personnel practices in the Maintenance Division to include: approval of leave, recommends promotions, separations, transfers, disciplinary actions, interviews new employees, etc.

8. Responsible for obtaining bids for contractural maintenance services. Formulates instructions, specifications, and other material necessary to obtain bids. Decides what bid to accept and assures completeness of contract with coordination with the Base Supply Supervisor.

C. Responsibility for Work of Others:

1. The incumbent is directly responsible for the Aircraft Maintenance Chief, Communications and Electronics Supervisor, and Motorized Equipment Superintendent.

2. The total maintenance area is controlled and managed by the Maintenance Supervisor which involves a minimum of 30 Civilian Air Technician employees.

II. SCOPE AND EFFECT OF WORK:

The incumbent is responsible for the efficient management of the maintenance shop, electronics, motor vehicles, and all allied activities. The degree of efficiency with which he operates will directly reflect in the over all operation of the Air National Guard.

ANGM 40-01
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Status: Revised
Dated: Sept 57

1 March 1958

III. SUPERVISION AND GUIDANCE RECEIVED:

Under general supervision of the Base Detachment Commander. The incumbent develops his own work procedures, generally establishes priorities and is primarily responsible for operation of the Maintenance Division.

IV. MENTAL DEMANDS:

Must be thoroughly familiar with all operations of the Maintenance Division to include all aircraft repair and maintenance, motorized equipment repair, ground safety, supply, etc. Must be able to advise or answer any technical question involving his division. Occasionally operates maintenance function under extensive heavy workload, which calls for organized planning and coordination within the section.

V. PERSONAL WORK CONTACTS:

Contacts are with subordinate personnel Base Detachment Commander, Air Force Inspectors, and visiting personnel from the Air Force and the National Guard Bureau.

VI. QUALIFICATIONS:

A. Mandatory:

1. Must possess six years overall experience in all phases of aircraft maintenance and repair of allied equipment.

2. Completion of an Air Force course in maintenance.

3. Must have management background, either military or civilian.

B. Desirable:

1. Completion of an Air Force maintenance management course.

2. Be a rated pilot on flying status to enable incumbent to make test flights on assigned aircraft.

1 March 1958

ANGM 40-01
Funct. Code: 80010
Status: Revised
Date: Sept 57

AIRCRAFT MAINTENANCE CHIEF

Grade: NGMS-9
Job Number: 43-10

I. GENERAL:

The position is located in the Aircraft Maintenance Section, Maintenance Division of an Air Technician Detachment. The incumbent is responsible for hangar and flightline maintenance, inspections, and repair of all aircraft, jet or conventional, assigned and transient. Incumbent must be thoroughly familiar with all technical phases of aircraft maintenance and allied equipment. Required to know and understand management principles and their application when dealing with subordinates. The efficiency with which the incumbent performs his work will contribute greatly to the over-all mission of the Air National Guard within a State.

II. DUTIES AND RESPONSIBILITIES:

1. Responsible for production planning and control of the Aircraft Maintenance Section, coordinating activities with the Production Scheduling Technician and the Maintenance Supervisor. Arranges for work assignment and deadlines on priority jobs in coordination with production control.

2. Directly supervises all field type maintenance (hangar maintenance) including aircraft docks, and all shops. The shops consist of hydraulic, propeller, instrument, electrical, jet engine repair and build-up, sheet metal, and machinist.

3. Directly supervises all flight line maintenance (organizational maintenance) including all unscheduled maintenance.

4. Assigns work to subordinates considering individual skills, aptitudes and knowledge.

5. Performs necessary follow-up on all assigned jobs. Must be aware of any work stoppage, problems or bottlenecks that may occur during the operation and take necessary steps to resolve these difficulties. Maintenance duties which will be accomplished consist of; scheduled aircraft and engine inspections, scheduled engine and accessory change, unscheduled maintenance, etc.

6. Conducts personnel actions that may include; approval of annual and sick leave and forwards it for final approval, settles complaints arising from work assignments, pay and job requirements, takes necessary action to create good work habits, and shifts personnel as required to meet peak workloads. Refers problems to the Maintenance Supervisor when they cannot be settled at this level.

III. PHYSICAL WORK EFFORT:

Active; climbs, works in straining position.

IV. WORKING CONDITIONS:

Inside and outside work; in proximity of moving propellers and jet engine blasts; danger of falling; danger of fumes and fire from high octane gasoline.

V. QUALIFICATIONS:

A. Mandatory:

1. Minimum of five (5) years' experience as an Aircraft Maintenance Technician, either civilian or military capacity.

2. Capable of researching, reading, and understanding technical orders, technical manuals, and stock lists.

3. Must be familiar with Air National Guard and Air Force aircraft maintenance procedures.

B. Desirable:

Graduate of formal maintenance training courses equivalent to the requirements for an A&E certificate.

Plaintiff's Exhibit 4. *AFR 60-2

Air Force Regulation
No. 60-2

Department of the Air Force
Washington, 14 March 1955

HISTORICAL FLYING

Annual Flying Requirements

	Paragraph
Purpose and Scope	1
Policy	2
Flight Requirements	3
Pilot Flying Examinations	4
Time Waivers	5
Evaluation Procedures	6
General Provisions	7
Exceptions	8

1. Purpose and Scope. This Regulation prescribes the annual flying requirements, flying examinations, and evaluation procedures. It applies to the following rated officers on flying status:

a. Officers on active duty.

b. Reserve Officers who are either mobilization assignees or are assigned to Air Force Reserve Combat, Combat Support and Flying Training Units (see AFR 36-73 for exceptions).

c. Air National Guard of the United States. (Exceptions are given in ANGR 60-2.)

2. Policy. It is Air Force policy that the minimum flying hours prescribed in paragraph 3 will be accomplished annually by rated personnel.

a. Commanders and rated personnel will be jointly responsible for insuring that minimum Combat Readiness

* This Regulation supersedes AFR 60-2, 29 December 1953.

Training requirements set forth below are completed by all concerned.

b. Commanders will not exceed the number of flying hours allocated to their Command by current programed flying hour documents.

c. It is not the intent of this Regulation to restrict additional flying training needed to improve or upgrade unit and individual capabilities or to restrict essential flights in support of command operations.

d. The maintenance of high level of skill in the performance of rated duties is of paramount importance. All flights made will be aimed at meeting these requirements. Flights must be scheduled to achieve maximum training and economy benefits.

3. Flight Requirements:

a. *All pilot personnel.* A minimum of 100 hours and a maximum of 120 hours pilot time flown as first pilot, first pilot instructor, co-pilot, or command pilot, of which:

(1) 20 hours will be instrument flight time, whether or hooded, of which 10 hours will be flown each 6 months.

(2) 15 hours will be night flight time, of which 6 hours will be flown each 6 months.

(3) 35 hours minimum will be flown each 6 months.

(4) At least 50 percent of each requirement above will be as first pilot or first pilot instructor at the controls of an aircraft; except that for command pilots, the above requirements other than (1) may be met when flying as co-pilot.

b. *Aircraft observer personnel (except aircraft observer (medical) and flight surgeons).* A minimum of 100 hours and a maximum of 120 hours as aircraft observer, perform-

ing in-flight duties common to the individual's rating and specialty, of which:

(1) 35 hours minimum will be flown each 6 months.

(2) 15 hours will be flown at night, of which 6 hours will be flown each 6 months.

(3) 6 flights will be of a minimum of 500 nautical miles duration.

c. *Aircraft observer (medical) and flight surgeons.* A minimum of 100 hours and a maximum of 120 hours as aircraft observer (medical) or flight surgeon, of which:

(1) 35 hours minimum will be flown each 6 months.

(2) 20 hours will be flown observing instrument flight, of which 10 hours will be flown each 6 months.

(3) 15 hours will be flown observing night flight of which 6 hours will be flown each 6 months.

4. Pilot Flying Examinations. All pilots and senior pilots are required to complete satisfactorily within a period of sixty days prior to their birthday the following flying examinations:

a. Demonstrate qualification as first pilot in one type of military aircraft.

b. Qualify for Air Force Instrument Certificate (see AFR 60-4).

5. Time Waivers. Time Waivers to the provisions of paragraph 4 are enumerated below for pilots in categories listed. Provisions of paragraph 4 will be complied with before the end of waiver period.

a. *180 day waiver:*

(1) After graduation from an Air Force Advance Pilot School.

(2) After date of recall to active duty.

(3) When a pilot has been off flying status for six months or over.

(4) For pilots participating in the Reserve Forces Program this waiver is granted commencing on date of assignment or attachment for flying, whichever is later.

b. *90 day waiver.* When not on flying status for a period of more than thirty days and less than six months.

6. Evaluation Procedures:

a. *Annual Evaluation:*

(1) Within 30 days subsequent to each 1 July, commanders will review the records of each person who is assigned or attached to their command for flying to determine if the requirements of this Regulation have been met.

(2) Those persons who failed to meet the requirements of this Regulation will be classified in one of the categories described below:

(a) Category I—Non-compliance was due to circumstances beyond control of the individual.

(b) Category II—Non-compliance was due to failure of the individual to use properly the available opportunities or to such basic lack of flying aptitude as to render continuation on flying status undesirable.

(3) Personnel placed in Category II will be ordered to appear before a flying evaluation board.

b. *Failure to Pass Pilot Qualification Check.* When a pilot fails to meet all of the provisions of paragraph 4, he immediately will be evaluation in accordance with "a" above, instead of waiting for the annual evaluation.

c. *Suspension from Flying.* A person classified in Category II need not be suspended from flying pending his

appearance before a flying evaluation board, except when such person is considerd unfit for flying.

7. General Provisions:

a. Flying time acquired as pilot or co-pilot in other than military aircraft of the armed services, powered with engines of at least 400 horsepower, may be credited 100 percent toward the requirements of this Regulation.

b. In meeting the requirements prescribed above, the instrument flight time performed during night flight conditions will be applied to either the instrument flight time requirements or the night flight requirements, but not to both.

c. Personnel on flying status as pilots, possessing an additional rating as an aircraft observed, are required to comply with pilot requirements of this Regulation only.

8. Exceptions. Commanders are authorized to suspend or modify any or all provisions of this Regulation when they consider such action necessary to accomplish a combat mission.

BY ORDER OF THE SECRETARY OF THE AIR FORCE:

OFFICIAL:

E. E. TORO
Colonel, USAF
Air Adjutant General

N. F. TWINING
Chief of Staff, United States Air Force

DISTRIBUTION:
S

Plaintiff's Exhibit 5. File of Bureau of Employee's Compensation

EMPLOYEE'S NOTICE OF INJURY OR OCCUPATIONAL DISEASE

Federal Employees' Compensation Act

This notice should be submitted to the immediate superior by an injured civil employee of the Federal Government, or by someone on his behalf, within 48 hours after the injury. Notice may be given either personally or by mail. It should be retained by the official superior unless the injury causes disability for work beyond the day or shift when injury occurred or results in any charge against the Bureau for medical expense, when it should be forwarded to the U.S. DEPARTMENT OF LABOR, Bureau of Employees' Compensation, together with the official superior's report of injury, Form C. A. 2. Before compensation is paid, written claim on Form C. A. 4 must be submitted to the Bureau.

Date of this notice 30 May, 1958

1. I hereby certify that I am employed as a Aircraft Maintenance Chief at the 104th FINCEPTION, Maryland AFWG, 2701 Eastern Blvd., Baltimore 20, Maryland and on Tuesday 20 May, 1958 at 11:30 A.M. I was injured in the performance of my duties at (1) mile north of Point of Rocks, Maryland.

2. Cause of injury Aircraft collision (which resulted in explosion and fire) in mid air at approximately 8,000 feet between jet trainer T-33, piloted by me, and Capital AL Viscount.

3. Nature of injury Second degree burns of head, hands, and wrists.

4. Names of witnesses to injury This information will be furnished at a later date when it is available.

5. If this notice was not given within 48 hours after the injury, explain reason for delay and state name of person to whom notice was first given and when Verbal notice (telephone) was first given at 12:15 P.M. EDT, 30 May 1958, to Lt. Col. Victor F. Kilkowski by nurse Mrs. Fredia ? ? ? ? of Frederick Memorial Hospital, Frederick, Maryland. Written notice delayed due to other commitments of this accident which had priority and had to be properly taken care of.

This injury was not caused by my willful misconduct, intention to bring about the injury or death of myself or of another, nor by my intoxication, and I hereby make claim for compensation and medical treatment to which I may be entitled by reason of the injury sustained by me.

Name GEORGE J. WINDISH, Capt. MD. AFNG
Adjutant
for JULIUS R. McCOY
Address 6 C Alder Drive
Baltimore 20, Maryland

Signed by Capt. George J. Windish
do to the fact that Capt. McCoy's
hands are burned and he is unable
to sign at this time.

July 14, 1958

Mr. Julius R. McCoy
6 C Alder Drive
Baltimore 20, Maryland

Re: File No. X-1201551

Dear Mr. McCoy:

Consideration of your claim for compensation is being held in abeyance due to the fact that you have not executed and returned to us the form of assignment which we sent to you with our letter of June 6, 1958. Will you please let us

have this assignment at your convenience in order that consideration may be given to payment of the bills for your medical and hospital treatment.

Very truly yours,

STUART ROTHMAN
Solicitor of Labor

By _____
WM. B. WRIGHT
Chief, Subrogation Branch

SOL:WBWright:dwh

August 28, 1958

Mr. Julius R. McCoy
6 C Alder Drive
Baltimore 20, Maryland

Re: File No. X-1201551

Dear Mr. McCoy:

We have not received replies from you to our letters of June 6, 1958, and July 14, 1958, regarding your third party damage claim. If you do not desire to avail yourself of benefits under the Federal Employees' Compensation Act, will you please so state at once; otherwise please return to this office the assignment furnished you with your signture, which is required by the provisions of the Federal Employees' Compensation Act.

Very truly yours,

STUART ROTHMAN
Solicitor of Labor

By _____
WM. B. WRIGHT
Chief, Subrogation Branch

SOL:WBWright:dwh

AGREEMENT

WHEREAS it is provided by Section 26 of the Federal Employees' Compensation Act (5 USCA Sec. 776) that if an injury or death for which compensation is payable thereunder is caused under circumstances creating a legal liability upon some person other than the United States to pay damages therefor, the Bureau of Employees' Compensation may require the beneficiary to assign to the United States any right of action he may have to enforce such liability of such other person or any right which he may have to share in any money or other property received in satisfaction of such liability, and further provides that if the beneficiary shall refuse to make such assignment when required by the Bureau, he shall not be entitled to any compensation under said Act.

NOW THEREFORE, in consideration of the payments made or to be made to me by the United States under the Federal Employees' Compensation Act on account of the injury sustained by me on May 20, 1958, at One mile north of Point of Rocks, Maryland, while employed as Aircraft Maintenance Chief (Pilot), by the Department of the Air Force, I hereby sell, assign, transfer, and set over to the United States of America all my right, title and interest in and to my claim for damages against Capital Airlines, and against any other parties other than the United States who may be legally liable for said injury, together with all rights of action thereunder.

Witness my hand and seal this 3 day of Oct., 1958.

JULIUS R. MCCOY (SEAL)

_____ (SEAL)

_____ (SEAL)

Witness:
HERBERT C. MORRIS, JR.

OFFICE OF
U.S. PROPERTY AND FISCAL OFFICER
STATE OF MARYLAND
STATE MILITARY RESERVATION
HAVRE DE GRACE, MARYLAND

29 May 1958

CERTIFICATE

I certify that Julius R. McCoy was working as a Civil Employee of the United States at the time of injury and *not* as a member of the Maryland National Guard.

IRVIN E. EBAUGH
Irvin E. Ebaugh
Lt. Col. NGB
USP&FO-Maryland

STATE OF MARYLAND
MILITARY DEPARTMENT
OFFICE OF
U. S. PROPERTY AND FISCAL OFFICER FOR MARYLAND
STATE MILITARY RESERVATION
HAVRE DE GRACE, MARYLAND

2 June 1958

U.S. Department of Labor
Bureau of Employees' Compensation
Washington 25, D. C.

Gentlemen:

Forwarded herewith Invoice from Robert H. Pilgram, M.D., in the amount of $50.00, and invoice from Frederick Memorial Hospital, in the amount of $40.14, covering medical services rendered Julius R. McCoy, who was injured on 21 May 1958.

Forms C.A. 1, C.A. 2, C.A. 16 and certificate, covering this injury, were forwarded your office on 29 May 1958.

Very truly yours,

IRVIN E. EBAUGH
Irvin E. Ebaugh
Lt. Col. NGB
USP&FO-Maryland

2 Incls.
1-Inv in amt of $50.00
2-Inv in amt of $40.14

STATE OF MARYLAND
MILITARY DEPARTMENT
OFFICE OF
U. S. PROPERTY AND FISCAL OFFICER FOR MARYLAND
STATE MILITARY RESERVATION
HAVRE DE GRACE, MARYLAND

June 23 1958

U.S. Department of Labor
Bureau of Empjloyees' Compensation
Washington 25, D. C.

Gentlemen:

Forwarded herewith Statement from Frederick Memorial Hospital for services rendered Julius R. McCoy on 5/21/58. Invoice covering these services was forwarded to your office on 2 June 1958.

Very truly yours,

IRVIN E. EBAUGH
Irvin E. Ebaugh
Lt. Col. NGB
USP&FO-Maryland

1 Incl
Statement

STATE OF MARYLAND
MILITARY DEPARTMENT
OFFICE OF
U. S. PROPERTY AND FISCAL OFFICER FOR MARYLAND
STATE MILITARY RESERVATION
HAVRE DE GRACE, MARYLAND

14 October 1958

U.S. Department of Labor
Bureau of Employees' Compensation
Washington 25, D.C.

Gentlemen:

Forwarded herewith Statement, in the amount of $40.14, covering services rendered Capt. Julius R. McCoy by Frederick Memorial Hospital.

Necessary forms covering injury were forwarded your office on 29 May 1958.

Very truly yours,

IRVIN E. EBAUGH
Irvin E. Ebaugh
Lt. Col. NGB
USP&FO-Maryland

Incls.
Statement fm Frederick Memorial
Hospital, in amt of $40.14

Plaintiff's Exhibit 6, Special Orders No. 182, Dated 13 Sept. 1955

MILITARY DEPARTMENT
STATE OF MARYLAND
OFFICE OF THE ADJUTANT GENERAL
FIFTH REGIMENT ARMORY
BALTIMORE

13 September 1955
mar

Special Orders
No. 182

EXTRACT

1. By authority of the Secretary of the Air Force, contained in communication from the Chief, National Guard Bureau, dated 7 September 1955, 1st Lt. Julius R. McCoy, AO 784050, 104th Fighter-Interceptor Squadron, MdANG, will proceed from Baltimore, Maryland on 18 September 1955, entering upon active duty for training thereon, reporting to the Commander, 3345th Technical Training Wing, Chanute Air Force Base, Illinois not later than 0800 hours 19 September 1955 as a student at the Aircraft Maintenance Officer Course OB4341, course starting 21 September 1955 for duration of 175 academic days. Upon completion of the course, or unless sooner relieved by proper authority 1st Lt. McCoy will return to Baltimore, Maryland. EDCSA 18 September 1955.

Expenses involving pay (including allowances), and transportation chargeable to:

TDN Pay : 5763870 041-1218 P521-01 S18-070
Travel: 5763870 064-4210 P527-02, 03, S22-606

Travel by privately owned conveyance, rail or commercial air authorized. If travel is performed by privately owned conveyance and more travel time is involved than a common carrier would require, officer is not considered in a pay status for any time in excess of the travel time allowed by common carrier. Travel of dependents not authorized.

Transportation Requests, if desired, will be secured from the U.S. Property and Fiscal Officer for Maryland. Travel will be paid in accordance with the provisions of ANGR 173-01, and changes that may be made thereto. Finance Officer making payment under this authority number will forward one copy of each paid voucher to the U.S. Property and Fiscal Officer for Maryland, State Military Reservation, Havre de Grace, Maryland. The provisions of JTR dated 22 December 1950 will apply. Entitled to flying pay under the provisions of Executive Order 10152, dated 17 August 1950.

Officer is cleared for access to classified material and equipment up to and including SECRET.

Officer will have in his possession the following records, when reporting to the school:

(a) Officer's current medical record.

(b) Officer's Form 5

(c) Copy of orders placing officer on flying status and/or NGB Form 3a.

(d) If available, copy of NGB Form 66 "Brief of Officer's Record".

By Order of The Governor:
MILTON A. RECKORD
Major General
The Adjutant General

Official:

BENJAMIN F. CASSELL
Benjamin F. Cassell
Lt. Col., AGC, MdNG-Assistant

Distribution:
CNGB-Attn:AF Div. Air O&T (2)
Cmdr 104th FIS (30) Cmdr 3345th Tech Tng Wing (30)
USP&FO (5) Gen Ruhl (1)
Files

Plaintiff's Exhibit 7. AFR 45-2

*AFR 45-2
1-3

ARMY REGULATIONS
No. 130-5
AIR FORCE REGULATION
No. 45-2

DEPARTMENTS OF THE ARMY AND
THE AIR FORCE
WASHINGTON 25, D. C., *13 April 1949*

NATIONAL GUARD
GENERAL PROVISIONS

	Paragraph
Authority	1
General	2
Responsibilities of Chief, National Guard Bureau	3
National Guard Bureau Regulations	4

1. Authority.—*a.* National Security Act of 1947 (Public Law 253—80th Cong. WD Bul. 11, 1947).

b. Transfer Order 10 (JAAF Bul. 12, 1948), National Military Establishment.

c. JAAFAR 1-11-20, 1948, as changed.

2. General.—*a. Army National Guard*—The National Guard Bureau is charged with administering approved Department of the Army policies other than those relative to training, for the Army National Guard not in the Federal service, and with promulgating Department of the Army directives and regulations applicable to the Army National Guard, including those relating to training.

b. Air National Guard.—The National Guard Bureau is charged with administering approved Department of the

* These regulations supersede WD General Orders 6, 1926.

Air Force policies other than those relative to training, for the Air National Guard not in the Federal service, and with promulgating Department of the Air Force directives and regulations applicable to the Air National Guard, including those relative to training.

c. Joint policies.—The National Guard Bureau is charged with administering approved joint Army and Air Force policies other than those relative to training, when such policies are applicable to both the Army National Guard not in the Federal service and the Air National Guard not in the Federal service, and with promulgating joint Army-Air Force directives and regulations applicable to both the Army National Guard and the Air National Guard, including those relating to training.

d. Communication.—The National Guard Bureau is the channel of communication between the Departments of the Army and the Air Force and the several States, Territories, and the District of Columbia on all matters pertaining to the Army National Guard and the Air National Guard.

e. Records.—The National Guard Bureau is the office of record of Department of the Army and Department of the Air Force records of the Army National Guard and Air National Guard not in the Federal service.

3. Responsibilities of Chief, National Guard Bureau.—*a.* The Chief of the National Guard Bureau is responsible to—

(1) The Chief of Staff, United States Army, for all matters pertaining to the Army National Guard.

(2) The Chief of Staff, United States Air Force, for all matters pertaining to the Air National Guard.

(3) Jointly to the Chief of Staff, United States Army, and the Chief of Staff, United States Air Force, for all matters pertaining to both the Army National Guard and the Air National Guard.

b. The Chief of the National Guard Bureau is responsible for—

(1) The proper organization of the National Guard Bureau, which shall include an Army Division and an Air Force Division, together with necessary administrative and executive offices.

(2) Efficient administration of the functions of the National Guard Bureau as outlined in paragraph 2.

(3) Submission to the Chiefs of Staff of such proposals for changes in existing policies, regulations, and laws as appear desirable to him.

(4) The maintenance of mutual understanding and cordial relations between the Departments of the Army and the Air Force, and the Governors, military officials, and National Guard of the several States, Territories, and the District of Columbia.

4. National Guard Bureau Regulations.—*a.* The National Guard Bureau will, from time to time, publish joint National Guard Regulations when such regulations are applicable to both the Army and Air National Guard, or separate National Guard Regulations when such regulations are applicable to the Army National Guard only or to the Air National Guard. National Guard Regulations will govern the Army National Guard and the Air National Guard when not in Federal service in the same manner as Army Regulations or Air Force Regulations govern the Regular components of the service.

b. Joint National Guard Regulations will be issued subject to the approval of the Chief of Staff, United States Army, and the Chief of Staff, United States Air Force. National Guard Regulations pertaining to the Army National Guard only will be issued subject to the approval of the Chief of Staff, United States Army. National Guard Regulations pertaining to the Air National Guard only

will be issued subject to the approval of the Chief of Staff, United States Air Force.

c. The Chief, National Guard Bureau, is authorized, within the limitations imposed by law, to issue such other publications pertaining to the Army or to the Air National Guard when not in Federal service as he may deem advisable or necessary, provided that such publications are pursuant to approved policy of the appropriate service or are specifically approved by the Chief of Staff of the appropriate service.

(AG-326 (31 Mar. '49))

BY ORDER OF THE SECRETARIES OF THE ARMY AND THE AIR FORCE:

OMAR N. BRADLEY
Chief of Staff, United States Army

Official:
EDWARD F. WITSELL
Major General
The Adjutant General

HOYT S. VANDENBERG
Chief of Staff, United States Air Force

Official:
L. L. JUDGE
Colonel, USAF
Air Adjutant General

Distribution:

Army:
C.
For explanation of distribution formula, see SR 310-90-1

Air Force:
D; G.
For explanation of distribution formula, see AFR 5-4.

Deposition of Irvin E. Ebaugh, Plaintiffs' Exhibit 9

11 Washington, D. C.

Wednesday, September 28, 1960

Deposition of IRVIN E. EBAUGH, called for examination by counsel for Defendant, The United States of America, pursuant to notice, at Grand Jury Room No. 3, U.S. District Courthouse, 3rd Street & Constitution Avenue, Northwest, Washington 1, D. C., before Alfred F. Goldstein, a notary public in and for the District of Columbia, commencing at 3:50 o'clock p. m., when were present on behalf of the respective parties:

For the Plaintiffs GLIEDMAN, MORGAN, LEVIN, DICKSON and JOHNS:

THEODORE E. WOLCOTT, ESQ.,
36 West 44th Street,
New York 36, New York

For the Plaintiffs CAPITAL AIRLINES and ESTATES OF MEYER and BRADY:

RICHARD W. GALIHER, ESQ.,
1215 - 19th Streeet, N. W.
Washington 6, D. C.

For the Plaintiffs GLIEDMAN and DICKSON (Maryland case only:

EVERETT L. BUCKMASTER, ESQ.,
10 Light Street,
Baltimore 2, Maryland

For the Defendant JULIUS R. McCOY:

JOHN H. MUDD, ESQ.,
10 Light Street,
Baltimore 2, Maryland

12 For the Defendant THE UNITED STATES OF AMERICA:

RUSSELL O. PETTIBONE, ESQ.,
3738, Civil Division,
Department of Justice,
Washington 25, D. C.

ALLEN BLUMBERG, ESQ.,
Civil Division,
Department of Justice
Washington 25, D. C.

LT. COL. ROBERT A. PRICE, ESQ.,
Office of Judge Advocate General,
Department of the Air Force
Pentagon Building,
Washington 25, D. C.

14 PROCEEDINGS

MR. WOLCOTT: By stipulation among counsel for all of the parties, it is agreed that objection as to any of the questions shall be reserved for the time of the trial, except for objections as to the form of the question only, which shall be made at this time, at this proceeding.

It is also stipulated and agreed by the parties that copies of the deposition shall have the same force and effect as originals and that filing is waived. Signing is waived except that counsel reserve the right to first check the transcript for typographical and other errors.

Is that right?

MR. PETTIBONE: It is all right, yes.

MR. MUDD: Yes.

15 Whereupon,—

Irvin E. Ebaugh

was called as a witness by counsel for the defendant, The United States of America, and, having been first duly sworn by the notary public, was examined and testified as follows:

Direct Examination

By Mr. Pettibone:

Q. Will you state your full name and address? A. Lt. Col. Irvin E. Ebaugh, State Military Reservation, Havre De Grace, Maryland, and I live in Westminster, Maryland.

Q. What is your present job or position, Colonel Ebaugh? A. I am the United States Property and Fiscal Officer for the State of Maryland.

Q. And how long have you had that position? A. I have been in this position since 1955.

Q. Where is your office located? A. At the State Military Reservation at Havre De Grace, Maryland.

Mr. Pettibone: Off the record.

[Discussion off the record.]

By Mr. Pettibone:

Q. What briefly are the duties of your position as United States Property and Fiscal Officer? A. I am charged
16 with properly handling any federal moneys appropriated to the State of Maryland or allotted to the State of Maryland for the support of the National Guard, to maintain all accountable records for federal property that is sent to the state for use by the National Guard.

Q. Do you keep any records of personnel assigned to the Maryland Air National Guard? A. In my office, no.

Q. Do you handle any of the records, the administrative records that pertain to such personnel? Do they pass through your office in any way? A. We do not now, no.

That has been delegated to an assistant who is located at the Air National Guard base at Martin Airport.

Q. Going back to May of 1958, did you handle such administrative matters? Did your office handle such administrative matters for personnel of the Maryland Air National Guard at that time? A. We processed the permanent duty technician pay rolls and maintained the records for those pay rolls at that time.

Q. Going back to that time and particularly May of 1958, did you ever have occasion to forward any papers or records pertaining to Air Technician employees, civilian employees of the Maryland Air National Guard through your office to other agencies or departments of the government? A. Yes, I did.

Q. Did you ever process any such papers through your office to the Bureau of Employees Compensation of the Department of Labor. A. I did, yes.

Q. Do you recollect that you ever processed any such papers through your office pertaining to one Captain Julius R. McCoy, of the 104th Fighter Interceptor Squadron of the Maryland Air National Guard? A. Definitely, yes.

Q. Do you remember particularly what those papers or documents were relating to Captain McCoy, which you processed through your office to the Bureau of Employees Compensation? A. This was, of course, the papers that are needed by the Bureau of Employees Compensation in support of any claims in payment of hospitalization that might arise out of an injury.

Q. Were these letters or forms or what kind of papers were these? A. Forms and a letter of transmittal from my office.

Q. Specifically, do you remember what kind of forms or what forms they were? A. It was a CA Form 1, CA Form 2, and CA Form 16. CA Form 1 is the individual's report of the accident or the circumstances surrounding the disability. CA Form 2 is the immediate supervisor's statements. And CA Form 16 is a request for hospitalization.

Q. Were these special forms pertaining to this particular accident of Captain McCoy's or are they forms of a general nature used in all case? A. They were forms of a general nature used in all instances for technicians.

Q. Do you know who drew up these forms or who provided them, where they come from? A. They are provided from normal government channels, the same as you get other forms from the Department of Labor.

Q. When you received these forms that you referred to, CA-1, CA-2, CA-16, had they been filled in and executed? A. They had been; yes, sir.

Q. From whom did they come to you, who transmitted them? A. They were transmitted to me from the Air Technician Base Detachment, commanded at that time by Colonel Kilkowski at Martin Airport.

Q. And what did you do with these forms when they came to you from this detachment? A. These forms were forwarded on to the Department of Labor.

Q. By your office? A. By my office.

Q. And did you submit a letter of transmittal with them when you forwarded them from your office to the Bureau of Employees Compensation? A. Yes, I did.

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MR. PETTIBONE: I would like the reporter to mark this as U.S. Exhibit for identification No. 13.

[The document referred to above was marked U.S. Exhibit No. 13 for identification.]

By MR. PETTIBONE:

Q. I now hand you U.S. Exhibit No. 13 for identification and ask you if you know what that is. A. This is a copy of my letter of transmittal to the Department of Labor with the enclosed certificate that I had executed and forwarded with the forms.

Q. What are the forms referred to in your letter of transmittal? A. CA-1, CA-2, and CA-16.

Q. And on the second page of that document, which you hold, is there a certificate? A. Yes, there is.

Q. And is that a certificate which you executed? A. I had executed that certificate, yes.

Q. Did you sign this certificate yourself? A. Yes, I did.

Q. And sent the orginal of it with this letter of transmittal to the Bureau of Employees Compensation? A. That is right.

Q. This certificate provides space that you certify that one Julius R. McCoy, who was Julius R. McCoy? A. He was a member of the permanent technician detachment employed at the air base in Martin Airport.

Q. Your certificate states that he was a civil employee of the United States at the time of injury and not a member of the Maryland National Guard. What was the basis of the information for making this certificate?

MR. GALIHER: I object to that. I think the document speaks for itself.

MR. PETTIBONE: It doesn't speak for itself.

MR. GALIHER: This man was authorized and delegated to do what he did here.

MR. PETTIBONE: This is not an objection to the form of the question.

By MR. PETTIBONE:

Q. Go ahead and answer the question.

MR. WOLCOTT: You will note my objection.

MR. BUCKMASTER: We all object.

MR. PETTIBONE: I realize that. I don't feel it violates the best evidence rule, so we will have to go ahead.

THE WITNESS: Captain McCoy, as his duties, as a permanent air technician, is actually a civilian employee and, as such, is not a member of the Guard during the normal 40-hour week he is expected to work.

By MR. PETTIBONE:

Q. Did you have any personal knowledge of the accident in which he was involved in May 20, 1958?

MR. WOLCOTT: Same objection.

MR. GALIHER: Same objection.

MR. BUCKMASTER: Same objection.

THE WITNESS: I had no knowledge of the accident.

By MR. PETTIBONE:

Q. Had you received any information concerning the accident in which he was involved on May 20, 1958? A. Just the newspaper accounts and the few verbal accounts that normally are scattered around by word of mouth, but nothing in detail.

Q. Was there any information concerning the accident in which he was involved on May 20, 1958, with resultant injury to him, to be found in these forms CA-1, CA-2, and CA-16, which you were transmitting to the Bureau of Employees Compensation? A. Those are just brief statements that are required to be filled in on the forms about the injury, the nature of the injury and the cause.

Q. When you forwarded these forms—let me ask you this first: Is it customary to forward these CA forms
22 when they come to your office to the Bureau of Employees Compensation if they relate to a civilan employee of the Air National Guard of Maryland? A. Yes, it is.

Q. So that the forwarding, would the forwarding of the forms in this instance, then, be a customary part of a normal routine of your office? A. That is right; yes, sir.

Q. And is it normal and customary in such cases to enclose your own certificate? A. This is required by the Department of Labor, positively identifying him as a technician rather and an Air National Guard man.

Q. These forms normally pertain to the injury of a civilian employee of the Air National Guard during the course of his employ?

MR. GALIHER: I object. He hasn't said that. You assume for the purposes of your question that his answer will be yes, and you are leading your own witness now.

MR. PETTIBONE: I will rephrase the question.

By MR. PETTIBONE:

Q. Do Forms CA-1, CA-2, and CA-16, when received normally in your office, in the normal course of this business, ordinarily relate to an injury sustained by a civilian employee of the National Guard in the State of Maryland? A. Yes.

Q. Did these forms in this instance with respect to Julius R. McCoy relate to an injury? A. They did.

Q. Now, in general, when you receive such forms pertaining to an employee, any employee of the Maryland Air National Guard, do you normally prepare a certificate to attach to your letter of transmittal when you send them to the Bureau of Employees Compensation? A. After a review of the forms, yes, we do attach the certificate and forward them.

MR. WOLCOTT: Do you mean review of the forms or review of the file?

THE WITNESS: Review of the form, information contained thereon.

By MR. PETTIBONE:

Q. What is the basis of your information? What do you use to supply you with information to assist you in preparing your certificate in the usual way in the normal case? A. The information taken from the individual's statements on the CA-1 and the immediate supervisor on the CA-2.

Q. Did you file any action in this instance? A. Yes.

Q. That is with respect to this Exhibit No 13? A. That is right.

Q. Did you personally talk with Julius R. McCoy before you forwarded these forms by this letter of transmittal with this certificate? A. No, I did not.

Q. Had you personally talked with Colonel Kilkowski, the detachment commander before your forwarded this letter of transmittal with the certificate? A. No, I did not.

Q. Had you personally investigated the accident in which Captain McCoy was involved on May 20th before you forwarded the letter of transmittal and the certificate? A. No, I had no part in the investigation nor did I make any of my own.

Q. Had you received information concerning this accident and the injury to Captain McCoy from any source other than the CA-1, CA-2, and CA-16 forms? A. Newspaper accounts, radio, that is all.

MR. PETTIBONE: That is all.

Cross-Examination

By MR. GALIHER:

Q. How long had you known Captain McCoy? A. I had known of Captain McCoy since he had been employed as a technician. Personally, I did not know him too well.

Q. You were acquainted with his duties? A. I knew he had been hired as a technician at the Air National Guard. I didn't have full and complete knowledge of his duties. This is beyond the scope of my responsibilities, to have such knowledge.

Q. Those forms that you filled out in this case were similar to other forms that you used in connection with other compensation cases at your base? A. That is right. They are. We use these for Army technicians and air technicians, the full-time technicians, both Army and Air.

Q. And your investigation led you to believe that you were justified in filling them out the way you did? A. Yes, definitely.

Q. What relationship did you have with Colonel Kilkowski? A. Colonel Kilkowski again was a member of the technician detachment. Beyond a few times when our duties brought us, caused us to meet, that is all.

Q. Where were you located in May of 1958 at the time of this accident that we are inquiring into? A. At the State Military Air Reservation in Havre de Grace, Maryland.

Q. Had you been to Martin Airfield where the 104th
26 Squadron was stationed? A. Not on that day, no.

Q. On other occasions? A. On other occasions. There are occasions when my duties require me to go there, to visit with my assistants and check over their operation, their part of the operation.

Q. What was your title in May of 1958, Colonel? A. As the United States Property and Fiscal Officer for Maryland.

Q. And you held a commission from whom? A. I am actually on active duty. I was called to active duty by the Department of the Army.

Q. And you were at that time? A. Yes.

Q. And did you wear any other hat, did you have any other title or any other duties at that time? A. That is all.

Q. What were your duties as far as the 104th Squadron at Martin Field was concerned? A. My interest in the 104th Squadron, Fighter Squadron, is to see that they are properly supported equipmentwise and that funds that are given to the State of Maryland for the operations, to support the operations were handled properly.

Q. You mean funds from the United States Government? A. Federal funds.

Q. How frequently would you visit them at Martin
27 Field? A. My visits were rather infrequent, about three or four a year. I maintained contact by having my assistant come to my office.

Q. Was the 104th Squadron required to give you detailed reports from time to time on all property and equipment at the Martin Feld? A. Not the 104th Squadron, no, sir. My assistant, the base supply officer who was supporting the unit.

Q. What was his name? A. Major James I. Considine.

Q. Was he located at your base or at Martin? A. He was located at Martin.

Q. Was he a major of the United States Air Force at that time? We are inquiring into May 20, 1958. A. Na-

tional Guard. He was a National Guard officer. As a technician, he enjoyed the same position as Colonel Kilkowski, Captain McCoy, the balance of the permanent-duty technicians employed there.

Q. That was what again, please? A. Base Supply Officer.

Q. Of the United States Air Force? A. He was the Base Supply Officer of the 104th Fighter Squadron at that time. That was the title he had.

Q. Did he have a commission in the United States
28 Air Force at that time? A. In the National Guard.

Q. In the National Guard? A. In the National Guard, State of Maryland, the Air Force. He was commissioned in the Air Force of the State of Maryland.

Q. Now, you said he was your assistant. Exactly in what way would you be able to give him instructions or orders if he was not a member of the United States Air Force? A. As a civilian technician, he was working directly under me.

Q. Under you? A. That is right, He answered to me.

Q. And that was true also of Captain McCoy? A. No, that was not true of Captain McCoy. Captain McCoy answered directly to the Base Detachment Commander, who at that time was Colonel Kilkowski.

Q. Was Colonel Kilkowski under you at that time? A. No, he is not under me.

Q. What was your relationship, if any, to Colonel Kilkowski? A. Just to see that he was—that my assistants at the base were properly discharging their duties in support of the Air unit.

Q. But in his status as a technician, you did have
29 authority over him, did you not? A. In his status as a technician I had no authority over him other than to process the pay rolls through my office; that is, the technicians' pay rolls. He answered directly to the adjutant general of the State of Maryland.

Q. On the occasions (I think you mentioned three or four times a year) that you went to Martin Field, what did you

do? A. Check over the supply procedures, the warehouse procedures, stocks of supplies on hand to support the unit, and meet with my controller there to check on the handling of the moneys, federal moneys.

Q. And if you found anything that dissatisfied you, what do you do about it? A. Cause action to be taken to clear it up immediately.

Q. And would you tell us what action that would consist of, please? A. That actually would be to—well, it could be in any number of different fields. If the warehousing was being improperly handled and caused the personnel working for Major Considine to stop what they were doing and straighten them out.

Q. The personnel would consist of whom? Technicians? A. Technicians working for Major Considine in the supply area.

Q. I see. Do you have any recollection as to specifically in a period of, let us say, for one year prior to May 1958, of any situations which came to your attention which dissatisfied you and which resulted in your giving orders to eliminate? A. No, I do not.

Q. You had nothing to do with the flight evaluation? A. Nothing whatsoever.

Q. There were not any special arrangements for compensation of persons injured at the 104th who belonged to the 104th Squadron, were there, Colonel? I mean by that, you just followed regular proced[illegible]e in sending in the forms to the Department of Labor. T[illegible]re was nothing unusual about the way compensation claims were handled at your base? A. Oh, definitely not. This is normal. This is normal procedure.

By Mr. Wolcott:

Q. Your salary is paid by the federal government? A. That is right.

Q. All of it? A. Yes.

Q. Was there any contribution by the State of Maryland

for the loss of this aircraft, the T-33? A. No, not to my knowledge.

Q. No reimbursement? A. To my knowledge, I know of none.

MR. PETTIBONE: I presume you are referring to
31 Captain McCoy's T-33.

MR. WOLCOTT: I think that was the United States Government's T-33.

MR. PETTIBONE: I wanted to be sure that the record is clear as to what T-33 you are referring to.

By MR. WOLCOTT:

Q. Did you understand I was referring to the T-33 used by Captain McCoy on that day, May 20, 1958? A. I assumed as much.

Q. After you sent in the compensation forms which were attached to your letter, which has been marked Government Exhibit No. 13, what happened after that with respect to this compensation claim? A. We were in receipt, through the unit, once again of bills for the hospitalization. These bills were subsequently forwarded to the department for payment.

Q. Is that the Department of Labor? A. That is right.

Q. And were they paid? A. I can only assume that they were inasmuch as there was never any follow-up made by the hospital through my office.

Q. Normally, if they had not been paid, would there be a follow-up through your office? A. Usually yes. When
32 money is owed, people try to collect it.

Q. Did the State of Maryland contribute to the payment of those bills? A. To my knowledge, no.

Q. These bills were for hospitalization and for medical care; is that right? A. That is right.

Q. Now, did you receive any response from the Department of Labor with reference to your letter, Exhibit No. 13? A. No, I did not.

Q. Normally, do you receive any response? A. Normally no, unless it would be an acknowledgment of receipt.

Q. Would you receive any response from them if there were a rejection of the claim? A. If there were anything that would cause them to reject it, certainly they would come back with questions to my office.

Q. That would be the normal procedure? A. Yes.

Q. You have never received any rejections from this claim; is that correct, sir? A. In this particular case, no; I have received none.

Q. Is there any special compensation act applicable to these air technicians or is that a general compensa-
33 tion act applicable to all federal employees that this application was made under? A. I believe this act is applicable to all federal employees.

Q. That is the general compensation act? A. Yes.

MR. GALIHER: I would like to read into the record at this time the two documents referred to by Colonel Ebaugh, both dated 29 May 1958. The first one is directed to the U.S. Department of Labor, Bureau of Employees Compensation, Washington 25, D. C.

"Gentlemen: Forwarded herewith Forms CA-1, CA-2, and CA-16, covering the injuries sustained by Julius R. McCoy on 20 May 1958, together with certificate certifying that the individual was working as a civil employee at the time of injury. Very truly yours, Irvin E. Ebaugh, Lieut. Colonel, National Guard Bureau, USP&FO-Maryland."

The second certificate, likewise dated 29 May 1958, the second document, dated 29 May 1958, and captioned "CERTIFICATE": "I certify that Julius R. McCoy was working as a civil employee of the United States at the time of injury and not as a member of the Maryland National Guard. [Again signed] Irvin E. Ebaugh, Lieut. Colonel, National Guard Bureau, USP&FO-Maryland."

By MR. WOLCOTT:

34 Q. Colonel Ebaugh, was it a part of your duties as U.S. Property and Fiscal Officer to certify Julius R. McCoy as the civil employee qualified to apply for com-

pensation? A. That is true, yes, and for any other technicians on our pay roll.

Q. And under what act is that, any regulation or statute? A. The certificate is required by the Department of Labor. This was handled in separate correspondence from the Department of Labor, and I don't have a copy of that.

Q. Now, you referred to Forms CA-1, CA-2, and CA-16, attached to your letter of transmittal, and you stated that you reviewed those forms to see that the information was completed and signed. What was the purpose of reviewing them? A. Just to determine in my mind that the information was complete and that nothing on them would disqualify the individual from the support or from compensation.

MR. WOLCOTT: Thank you.

By MR. BUCKMASTER:

Q. May I ask you a question, Colonel Ebaugh? Who is your immediate supervisor? A. I am assigned to the Chief of the National Guard Bureau here in Washington.

35 Q. Who is your immediate superior there? A. It would be the Chief of the National Guard Bureau, General McGowan.

Q. How about General Wilson? A. General Wilson is the Chief of the Air Division. In this respect you might say I am wearing two hats, because I am working for the Air and the Army National Guard.

Q. That is a federal agency? A. That is right.

Q. You are not a member of the Maryland National Guar? A. No, I am not. I am a member of the Maryland National Guard on active duty. I have been called to active duty in order to hold the position I have.

Q. You were on active duty at the time of this accident? A. Definitely, yes.

Q. And when you sent in these reports you knew that Captain McCoy had been injured while flying an airplane; is that right? A. Certainly from the reports received there was every indication that he had been.

MR. BUCKMASTER: That is all.

MR. WOLCOTT: You mean the airplane, T-33, which was an Air National Guard plane?

THE WITNESS: Yes.

36 By MR. BUCKMASTER:

Q. I will ask you one more question. When was your first contact with Captain McCoy? When did you first have any contact with Captain McCoy? When did you first have any contact with him? A. Actual personal contact I had none with Captain McCoy.

Q. Did you ever have any other type of contact with him prior to this accident? A. In connection with this accident.

Q. Nor any other capacity? A. I had met him just informally at one of the field training camps. I make it my business to attend the field training camps on visits to determine just how they are getting along.

Q. Did you have any duties in connection with the field training camps? A. No, I just attend as a visitor.

MR. BUCKMASTER: That is all.

MR. WOLCOTT: That is all.

Redirect Examination

By MR. PETTIBONE:

Q. At the time you transmitted these CA forms to the Department of Labor by your letter of transmittal dated May 29, 1958, did you have any personal knowledge
37 of the circumstances leading up to and surrounding the aerial flight in a T-33 which Captain McCoy made on May 20, 1958.

MR. GALIHER: I object to that question.

MR. PETTIBONE: I am sorry.

MR. GALIHER: I object to that question.

MR. WOLCOTT: That is immaterial.

MR. GALIHER: He said he didn't investigate it.

By MR. PETTIBONE:

Q. I asked you if you had any personal knowledge. A. I had no personal knowledge of the circumstances surrounding the flight or the accident, no.

MR. PETTIBONE: That is all I have.

Recross-Examination

By MR. WOLCOTT:

Q. You mean you were not present when the collision took place? A. Definitely not.

MR. PETTIBONE: Thank you.

[Whereupon, at 4:30 o'clock p.m., the taking of the deposition was concluded.]

[Signature waived.]

Deposition of Major Milton D. Britton, Plaintiffs' Exhibit 10

6 Baltimore, Maryland
May 11, 1960

Deposition of Major Milton D. Britton, upon oral examination by Plaintiffs, before Bernard C. Daley, Notary Public, taken at the offices of Messrs. Semmes, Bowen and Semmes, 2500 Mathieson Building, Baltimore 2, Maryland, beginning at 2:45 o'clock p.m., Wednesday, May 11, 1960.

7 APPEARANCES.

RICHARD W. GALIHER, Esq.
EVERETT L. BUCKMASTER, Esq.
THEODORE E. WALCOTT, Esq.
LOUIS DAVIDSON, Esq.
RUSSELL G. PETTIBONE, Esq.
JOHN H. MUDD, Esq.
LT. COL. VICTOR F. KILKOWSKI
MAJ. JOHN F. R. SCOTT
MAJ. LAWRENCE W. HUNT

Thereupon—

Major Milton D. Britton

was called as a witness and after having been duly sworn was examined and testified as follows:

Examination by Mr. Galiher

Q. Will you give us your full name and address, please? A. Milton D. Britton, Box 671, Route 15, Baltimore 20, Maryland.

Q. What is your occupation at the present time, Major?

A. Major in the United States Air Force with the
8 duty title as Air Advisor to the 104th Fighter Squadron.

Q. How long have you been in the United States Air Force? A. Approximately close to fifteen years.

Q. How long have you been detached to the 104th Squadron? A. It was two years the 28th day of January, I believe.

Q. You were there then from January 28, 1958 up to and including the present time? A. Yes, sir.

Q. What had you done just immediately preceding your assignment to the 104th Squadron? A. The previous two-year tour was at Nellis Air Force Base, Las Vegas, Nevada, and my duty title was Base Operations Officer the last twelve months.

Q. How long have you been flying, Major? A. Since March 10, 1943 when I graduated as a pilot. Started in 1942.

Q. Did you receive written orders when you went to the 104th Squadron in January of 1958? A. Yes, sir.

9 Q. What did they state? A. I can't tell you what they say. I can give you——

Q. Please just the substance. A. I received orders approximately three weeks prior to departing Las Vegas said that I would report to 14th Air Force for briefing, proceed then on to CONAC at Mitchell Field, New York, at that time for briefing, report to Duty Station, Harbor Field, 104th,

Baltimore, Maryland. That is the general. It had some time delay enroute, and so forth, but that was the meat of it.

Q. Who did you report to when you arrived in Maryland? A. The first Maryland Officer I got in touch with was Colonel Kilkowski.

Q. Has he been your senior officer since arrival? A. He has been the Commander and Base Detachment Commander since I have been here, yes, sir.

Q. Well, how does that govern the relationship between yourself, Colonel Kilkowski, and 104th Squadron? A. Well, all I can say is that we are partners in trying to get a first-class outfit; general terms. I have no command authority over him. He has no command authority over me.

Q. And by use of the term "partners" would you explain what the partnership consists of? A. A team. He is working, trying to make a top outfit. I am working to try to see if I can help him with my knowledge, supposed to be up-to-date knowledge; up-to-date knowledge. The reason assigned there is every three or four years when I leave another man will come in and take my place and he will definitely be up-to-date on more modern techniques than I am.

Q. Now, exactly what duties have you had and what assignment since you arrived in January of 1958? A. I have been assigned at one duty as an Air Force advisor to 104th Squadron.

Q. And what in general have been your activities as advisor of the United States Air Force to the 104th Squadron? A. Okay. I am on Standardization Board—

Q. Pardon me. Standardization? A. Standardization Board. A member of the Standardization Board. I am a member of——

Q. May I interrupt you to ask you what duties do you have on the Standardization Board? A. On the Standardization Board I am a member. Otherwise if something new comes up, a new type of problem that we

have to decide as a standard, a squadron SOP, Standard Operating Procedure, I will sit in on the meeting and——

Q. By "Standard Operating Procedure" you mean of the 104th Squadron? A. Yes, sir, strictly 104th. I like to think that they will listen to my words when it comes my turn to give my opinion on it. They can, or they can disregard it. It is up to them.

Q. Who are the other members of this Board? A. It would be Flying Training Supervisor, the Operations Officer and I believe the Commander and then maybe one or two others that I am not sure and, for instance, let's see. Standardization Board, it would be the Flight Leaders also, each Flight Leader.

Q. Was that true in May of 1958? A. Yes, sir. These Boards change. Names change, except I don't change on them.

Q. Well, these men you have indicated by title, are they likewise members of the United States Air Force like yourself? A. No, sir. Now, back off. They are members of the Air National Guard, United States Air Force.

Q. And who appoints them, Major? A. Federal Recognition Boards.

Q. Of the United States Government? A. Of the Guard Bureau, as far as I know. I am not too detailed in their exact methods. They get their promotions, and so forth.

Q. That would be then from the office of the Chief of the National Guard Bureau? A. I couldn't answer that. I don't know.

Q. I see. Now, what would some of your other duties consist of? You told us about the Standardization Board. A. I am instructor-pilot in each type aircraft they have at the field. I am an instrument-check pilot. I am the test control officer for the State of Maryland.

Q. What are the duties of a test control officer? A. Airman upgrading through the level from OJT to three,

five and seven levels. This is the Air Force practice
13 that is carried out in the Guard. Certain ratings before they can get promoted they have to be certain ratings on three levels, OJT, generally type of man. A five level, he is qualified to work on the equipment. Well, say, for instance, he is a mechanic, a jet mechanic. He is fully qualified to work on an airplane but if he wants to get Master Sergeant, for promotion, and so forth, he works on up through seven level which includes supervisory thing on his test, and we give all this testing, which is standard Air Force testing. We administer that, send it through the Test Control people at the Air Force. They score it.

Q. That is United States Air Force? A. It is United States Air Force in this case.

Q. Do you rate them, Major? A. I do not. They are scored. Amarillo, I believe.

Q. Is that a branch of the United States Air Force? A. Yes, sir.

MR. MUDD: OJT is on job training.

THE WITNESS: On job training.

Q. (By Mr. Galiher) Do you know Captain McCoy? A. Yes, sir.

14 Q. Did you first meet him when you came here to the Harbor Field in 1958? A. Yes, sir.

Q. What contact, what relationship have you had with him? A. He was the—now, the exact title I don't know, but he was the officer in charge—that is the way I got it—of our Aircraft Maintenance and——

Q. When you say "of our Aircraft Maintenance"—A. 104th, when I say our.

Q. You mean United States Air Force? A. Of the 104th Squadron, my Duty Station.

Q. Please continue. A. In that capacity I have inspectors work for me that advise—or they are not inspectors; advisors, and it may be—there is one of them I have that is a Maintenance Technician, or a Maintenance Supervisor

and he runs periodic checks to see how different sections of the shop are going and if there is something that is not quite up-to-date then I go in and talk to them and ask them what they think about this problem, "Can you go along with this? I think maybe you should, if you can," and try to talk it out and help them, point up any shortcomings or any way they are doing it not quite up to Air Force standards and that is about it. It is a general contact.

Q. Have you ever been in the United States Air National Guard? A. No, sir. You mean have I been a member of the Air National Guard?

Q. Yes. A. No, sir.

MR. PETTIBONE: I am going to have to make the same objection to the form of the same question again, Mr. Galiher. It is not the United States Air National Guard.

MR. GALIHER: Air National Guard of the United States.

MR. PETTIBONE: No objection if it is so stated.

Q. (By Mr. Galiher) Did you have any other duties, Major, that I have interrupted you and prevented you from discussing for us? A. Let's see. I got through Instrument Check Pilot. We have a manual listing and I—we have a manual listing and I can't quote all of them.

Q. Where did the manuals for maintenance of the T-33 plane come from? The Air Force? A. Put it this way: I think they come from the Air Force.

Q. That also includes Operations, does it, Major? A. Operations of the T-33?

Q. Yes. A. No, sir. Well, wait a minute. Operations come under 60 series, which are Air Force, or Air National Guard Regulations. Air Force Regulations.

Q. United States Air Force Regulations?

MR. PETTIBONE: Just a moment. As counsel for the witness, in which capacity I now serve——

MR. GALIHER: I understand your objection. I am trying

to cure it. Would you go back and read the last part of his answer?

(Testimony read by Reporter.)

Q. (By Mr. Galiher) Air National Guard of the United States or Air Force Regulations?

MR. PETTIBONE: Well, by your question what do you mean by "operations"? Are you referring to whether the airplane will be flown, or that sort of thing, or referring to everything else?

17

MR. GALIHER: I am referring to what he referred to when he called it 60 series.

THE WITNESS: Rules and Regulations. That is what I meant when I said 60 series.

MR. PETTIBONE: You can answer his question.

Q. (By Mr. Galiher) Major, where do the Operations and Maintenance Manual that go with the airplane come from? A. Maintenance Manuals, I believe, come from the Air Force. I don't know what you mean by "Operations Manual".

Q. Well, I gather that you are covering exactly what I have in mind with your answer. Where do you send your reports to your superior officers, Major? A. Fourteenth—hold off a minute. My direct command lies with Colonel Peters, Wing Advisor, 113th Wing, and then through 14th Air Force at Warner Robbins, Georgia.

Q. (By Mr. Galiher) Of the United States Air Force? A. They are Air Force people, yes, sir.

Q. When you are having trouble understanding my layman's language, perhaps I had in mind the Pilot's Handbook. A. The Pilot's Handbook dealing with operation, emergency operation, and so forth, with each aircraft that is on the field, comes also through Maintenance, which is I believe, Air Force, comes from Air Force people.

18

Q. United States Air Force? A. I believe it comes from the United States Air Force.

MR. DAVIDSON: May I ask——

THE WITNESS: Air Force Supply.

MR. DAVIDSON: Mr. Pettibone, at this point I have been wanting to ask through you if we can see copies of the T-33 Manuals or Handbooks in force at that time, May 1958.

MR. PETTIBONE: That question came up before, in February, and it is a matter concerning which I don't personally have knowledge or information to give you an answer. I recollect that Major Robert Prince who was here with me at that time said that he was going to look into it to see what manual or parts of which manuals are available in the Pentagon; that is to say, which ones they have and that he would be glad to make available to you and would make available to you whatever they actually have there,
19 and I have lost track of that matter since that time, so I don't know what he has been able to find or whether he has turned it over and all I can say for the moment, since he is not here himself today is that I will be glad to make a note of it and next week when he is back I will take it up with him.

MR. DAVIDSON: All right, sir. Then we will follow it up through you then.

MR. PETTIBONE: Yes. I think there is some kind of a problem and I remember him mentioning there is some kind of a problem. The manual, part of it, they don't have it, or it has changed so much, or something like that. I'm not sure what it was.

MR. DAVIDSON: If you could make it available to us, what they do have governing operation and maintenance at that time——

MR. PETTIBONE: I will make a note of it right at this time and I will take it up with him first thing next week and then we will let you know as soon as we can.

Q. (By Mr. Galiher) Major, did you make certain that the pilots of the 104th Squadron had both a rating
20 and and actual pilot's status before they were permitted to fly? A. No, sir.

Q. Did you have occasion to instruct the pilots? A. Do I have occasion to instruct pilots?

Q. Yes, or did you in May of 1958? A. Yes, sir.

Q. And in what respect do you instruct them? A. In one, as I have already stated, would be instrument checks and you can say in any phase, starting in any phase of flying operations.

Q. Safety phases? A. Any phases. Weapons, anything.

Q. And did that likewise apply to Captain McCoy? A. Did I instruct him?

Q. Yes. A. No, sir. That I might instruct him——

Q. You had authority to instruct Captain McCoy and the other pilots? A. Do I have authority to instruct?

Q. You had authority to instruct Captain McCoy and the other pilots? A. No. I can only fly with them, if it is in concurrence with either of these two—with Kilkowski at that time.

21

Q. You have reference to the partnership that you mentioned? A. Yes, sir.

Q. Had you reached the conclusion that a pilot was not qualified to operate a plane what would you do?

Mr. Pettibone: Could I ask that that question be made a little more specific? A pilot might not be qualified to operate a plane for a variety of reasons. He might have a leg cut off in a plane accident. He might be rip-roaring drunk some night.

Mr. Davidson: He referred to the facts he gave them their checks.

Mr. Galiher: Well, I will accept everything you have said, and I am speaking generically.

The Witness: Well, would you pin it down?

Q. (By Mr. Galiher) If you felt that pilot A was not qualified to fly a T-33 plane what would you do, Major, regardless of the reason? A. All right. We will assume that I observed something that I definitely didn't think he should fly, and it looked like he was going to fly. Is that what you are getting at?

22

Q. Yes, sir. A. The first step would be to talk to the Operations Officer and bring this, my feelings forward to him and normally that would take care of it. He would, if there was any reason he shouldn't fly, because he didn't know it, as quickly as I bring it to his attention he checks it and then right, that is it. He wouldn't fly.

Q. He would always follow your—— A. Not necessarily. If there was a difference of opinion which there could be, then ask him permission to see the Commander and ask the Commander and he would probably tell him.

MR. DAVIDSON: I couldn't hear that.

Q. (By Mr. Galiher) He would what? A. He would probably cancel the flight.

Q. On your recommendation? A. On recommendation, right.

23 MR. GALIHER: I think that's all I have.

MR. WOLCOTT: I'd like to ask a question, sir.

Q. (By Mr. Wolcott) Is there any periodic review in connection with the pilot's record? A. Which record are you talking about?

Q. Well, the record of a pilot like Captain McCoy? A. You mean flying record?

Q. Yes. A. Flying records. Is there—off the record——

Q. Periodic review conducted. A. This is covered by, I believe, Air Force Regulation 60-4, which is once a year they do have a, take a check flight, also an instrument flight, check flight.

Q. And do you participate in that? A. Yes, sir.

Q. Now, do you check any other aspect of the pilot's record except his proficiency in operating the aircraft? A. That one is strictly 60-2; 60-4. My job describtion says that I will check those—60-2 and 60-4, that those compliances are met.

Q. In other words, the pilot's character as well as

24 his—— A. That is only on flying. Not character.

Q. Only on flying, that's all? A. Yes.

Q. All right. Thank you. You also checked his past flying record? A. No, no.

MR. WOLCOTT: All right. That's all I have.

Q. (By Mr. Galiher) A few minutes ago I was asking you about a situation which might exist if you concluded that a pilot for reasons which you had decided on was not qualified or should not be permitted to fly at a given time. A. Yes, sir.

Q. And you explained to us what you would do. Would you also make a written report of that? A. No. Let me qualify that. No.

Q. Under no circumstances? A. Now you have left a wide field open. I can't—under no circumstances—because I don't know quite what you are getting at.

Q. I take it you have never done it since you have been there, since 1958 then? A. Never done?

Q. You have never submitted a written report where you have decided that a pilot should not be permitted to fly and had him cancelled? A. I believe I have. Yes, sir, I have made those reports. I can distinctly remember one that he was not to fly again until he had had a check rate and certain other qualifications were met, and a suggestion to him. I had wrote it up on a 60-4 check.

Q. Do you recall the name of that person? A. Yes.

Q. Who was it? A. Lieutenant Shilton.

Q. And where did your report go? A. It was part of the 60-4 check, I believe; or it was one of the CONAC mission forms; one or the other. I forget which one it was.

Q. It was then, I believe, transmitted to the United States Air Force? A. No, it did not leave the office, but it was on a record that the United States Air Force can check when they check it annually.

Q. Was that incident one where the pilot was about to take off? A. No, sir. It was a flying safety on the range, on the gunnery range. I thought he was going too low over the target, was liable to get hurt.

Q. I see. Then you took steps which were acquiesced in by the Commander? A. Yes. Now wait a minute.. I think you asked the question: I took steps that was agreed on by the Commander, that he agreed that we carry it through this way. Is that the question?

Q. Yes. A. It didn't get to the Commander. It got to the Operations Officer and it was all settled there.

Q. Was he later restored to a flying status? A. He was not taken off flying status. My recommendations were that he not fly again without further dual recheck. He continued to fly, but he had more dual.

27 Q. Well, who gave the dual and recheck thereafter? A. Give you a name? To be absolutely accurate I can't give you a name.

Q. Well, can you give the organization—— A. Yes. I believe his flight leader, his flight commander, I believe gave him that dual.

Q. Flight Commander of the 104th Squadron? A. We have five flights in the 104th Squadron. One of those Flight Commanders that he was assigned under, I believe he is the officer that gave him that dual.

Q. You don't remember that man's name? A. I don't remember the name, but it is a matter of record

Q. Anyone else that you can recall? A. No, I don't believe I have ever failed any, right besides that one.

Q. Since 1958 has there been any indication brought to your attention of any reckless flying on the part of the 104th Squadron as a result of which you took action?

MR. MUDD: Objection.

28 MR. PETTIBONE: I am going to ask the witness not to answer that too unless you can indicate to me in some way how that would be material and then after I have a chance to refer to him, whether there is any privilege nature to his answer I have to instruct him not to answer. Now is that possibly material?

MR. GALIHER: Well, it has to do with the relationship

between the United States Air Force and the National Guard.

MR. PETTIBONE: I fail to see where there is any relevancy in any event, no matter what the answer is, as to what has happened since 1958 to the relationship which existed on May 20, 1958.

MR. GALIHER: Now you have noted your objection, Mr. Pettibone. Are you instructing your employee not to answer—your associate I should say. Excuse me.

MR. PETTIBONE: Off the record.

(Discussion off the record.)

MR. PETTIBONE: He may answer your question, if he can.

THE WITNESS: Would you read it?

(Question read by Reporter.)

THE WITNESS: No.

29 Q. (By Mr. Galiher) Did your answer include not only the Squadron but any of the pilots thereof? A. Yes, sir. I just filled out a yearly flying safety award for the Unit and I was trying to think what I wrote up there and one of the paragraphs was that we had had no violations, not only from my own end but from anybody else's end that might have observed these people flying across the country and around. There was no violations.

Q. (By Mr. Galiher) And your answer "no" included from the time you arrived at the Base up until and including the present? A. I will—yes. Let's see. Yes, I will qualify that to say from the time I arrived at the Base.

Q. (By Mr. Wolcott) What is your procedure where you find that a pilot is given to reckless flying? A. If I am flying with him and he is given to reckless flying——

Q. Not when you are flying with him. When you know about it, where he has the reputation——A. That is all covered in regulations.

30 Q. What regulation is that? A. I couldn't quote it. It would be if he is observed. Well, now, wait a

minute. It might not be covered by regulation. For instance, if somebody observed an airplane in some fairly remote territory and called the Squadron, the Operations Officer with whom he would be normally channeled; they might have said, "We saw a jet. He was flying low," or something like this, and from the Operations Officers viewpoint there is only one jet up and they get enough of the markings that he might say, "That is a real good chance that that was my boy," or we will say that they get the numbers, but it wasn't a policing agency.

I would go directly to the Commander; nobody else involved. From my association with Major Scott and Colonel Kilkowski, if this happened, I'd have to honestly say I believe they'd put him before a FEB, Flying Evaluation Board. He would have to show cause why he could continue to fly.

Q. What is a Flying Evaluation Board, sir? A. It is a Board of Officers convened to take testimony from the pilot, go over his past record and make a determination, make recommendations to Air Force that he be eliminated from flying or carry on in his present status; one or the other.

31 Q. That is a United States Air Force Board, I take it, sir? A. It would be in this case a Board of Air Guard Officers of which one Air Force member would be on that Board, which would be myself.

Q. (By Mr. Galiher) You mentioned an award that was given the 104th Squadron? A. An application for an award.

Q. For safe flying. Will you tell us—— A. Under a certain regulation they have 14th Air Force has award periods from 31 March of, I believe it is, 1st of April through 31st of March. In this past period that this happened we had no accidents or incidents and under 14th Air Force Regulation they are to be nominated, of which it is the job of my shop, and I nominated them for award.

Q. You nominated the 104th Squadron to the United States Air Force for this award? A. For Flying Safety Award.

Q. And I assume that meant that you recommended—— A. That's right.

Q. —to the Air Force that they receive this
32 award? A. That is corect.

Q. You mentioned a few minutes ago that you had technicians or that there were technicians which worked for you, or did certain work for you. A. Yes, sir, I have two Air Force men. They are both Tech Sergeants that are assigned to my office and work under my direct control. One is an administrative specialist. He handles my administrative work in my office. He also advises and tries to help the administrative section of the 104th, 104th Air National Guard Unit. The other man is a maintenance technician and his sole job is advice on maintenance activities.

Q. Maintenance activities concerning the planes—— A. Yes, sir.

Q. —assigned to the 104th Squadron? A. To the 104th Squadron.

Q. Planes of the United States Air Force? A. Sir, that is a problem I have heard kicked around ever since this accident and I have never heard one way or another who the airplanes belong to, so I certainly couldn't answer this.

Q. What is the name of this maintenance man who
33 has been there since you have been there? A. Sergeant Baldwin.

Q. Do you remember his first name? A. I do, but I can't think of it right now.

Mr. Davidson: Is he there now?

The Witness: Yes, sir.

Q. (By Mr. Galiher) And the other Sergeant are both in the United States Air Force like yourself? A. Yes, sir.

Mr. Galiher: I think that's all.

Mr. Mudd: I'd like to ask one or two, if I may.

Examination by Mr. Mudd

Q. Major Britton, since your assignment to the 104th have you had anything to do with the payrolls or payroll records of the Squadron? A. The Federal payroll of their drill days and their two weeks summer camp, yes; I sign and verify those payrolls.

Q. Have you conducted any lectures to the Squadron? A. Yes, sir.

Q. What have they been on? A. A large percent-
34 age of them have been on Fighter Weapons and Tactical Work; some on Flying Safety.

Q. Since 1958 have you served among several capacities as an Instructor-Pilot? A. Yes, sir.

Q. Have you served as an Instructor-Pilot since your arrival in 1958? A. Yes, sir.

Q. Who did you instruct? Not names, but by personnel or groupings. A. This gets a little technical. I can say I instructed some of our new people that just graduated from school, such as Shilton, but whether I remember the log IP in the pilot column which goes down as IP, I don't know if I did or not, but most of them I do.

Q. But in any event you instructed personnel of the 104th? A. Yes.

Q. Does the 104th have its own instructor-pilots in addition to yourself? A. Yes, sir.

Q. Do they serve and perform the same activities
35 and functions when acting as instructor-pilot as you do when you act as instructor-pilot? A. Yes, sir. For instance, they instruct me sometimes.

Q. In what type of aircraft do you instruct? A. The F-86H, C-47; and it has been a year last November, I believe the 28th of November, 1958 since I flew the T-33.

Q. You did though at one time instruct on the T-33? A. Yes.

Q. Have you served on any Federal Recognition Board since your assignment to the 104th? A. Yes.

Q. Would you explain what you mean by the term Federal Recognition Board as used—— A. I can remember two cases. One was Captain Cuttaire, or Warrant Officer Cuttaire. The other one was Lieutenant of Communications, I believe.

Q. Excuse me. I didn't understand. A. Lieutenant of Communications. I don't remember his name.

36 Q. Lieutenant of Communications? A. I don't remember his name. When all requirements are met to fill a slot in the TO——

Q. Now you are talking about a slot in the TO of the 104th? A. Of the 104th Military.

Q. Right. A. Then they get approval from the Guard Bureau first.

Q. Which Guard Bureau? A. There is only one Guard Bureau. Pentagon.

Q. Right. That is in the Pentagon? A. When all paper work is okay, they have met all requirements for the Guard Bureau, then they hold Federal Recognition Board, of which I am the president.

Q. And who are the other members of the Federal Recognition Board? A. They change from time to time. I think they put them on for maybe six months or a year at a time. I couldn't tell you.

Q. Who are the current members? A. I don't know that either.

37 Q. Who were the members in 1958? A. I don't remember that either.

Q. Do you remember whether they were members of the 104th? A. They were.

Q. And what was the purpose of the meetings of the Federal Recognition Board? A. In the case of Warrant Officer Cuttaire, he filled a slot as Captain. We checked his record, background, physically, moral, all known information on the gentleman and concurred that he should be Captain to fill the slot. This also happened in the case of the man in Communications.

Q. And to whom would you send the decision or conclusion of the Federal Recognition Board? A. My administrative Sergeant sends it out. I don't know where it went.

Q. To whom did he send it? A. Now wait a minute. Back off. Correct that last statement. The First Sergeant of the 104th sent it out and I don't remember how it was addressed.

Q. Do you know to whom it was sent? A. No, I don't

38 Q. What agency it was sent? A. I do not.

Q. Who selects the Federal Recognition Board? A. I believe the Commander of the Squadron. I believe that is the way it is done. I don't know for sure.

Q. And you currently are the president of the Federal Recognition Board? A. I think in my CONAC Manual that is one of the directives, states he will be the president; the Air Force Advisor will be the president.

Q. Do you or anyone under your direction conduct inspections of the facilities, equipment of the 104th? A. Informal inspections, yes.

Q. Are they done periodically? A. Yes.

Q. How often are they done? A. Now, I will qualify that last question. In some sections they are done periodically every six months. In other sections, like operations, it could be daily.

Q. Are reports made as a result of these inspec-

39 tions, either periodically or daily? A. Some are. Some aren't. If it is extremely good we write it up and tell them about it. If it is extremely bad we write it down and put it on the record.

Q. To whom are these reports sent? A. They are filed in my office. The report is sent—a copy of the report is sent to the Commander of the 104th.

Q. Are copies sent to any other person or agency? A. Another copy in my file, and that's all.

Q. Do you turn your file over at the end of a year or the end of a period to any other person superior, or agency?

A. The files on the written advisories that go to the Unit are on file, can be inspected and usually are by our once a year inspection. Our office is inspected the same time the 104th is inspected by the Air Force.

Q. You say the Air Force inspects your office? A. Yes.

Q. And is that done once a year? A. Once a year.

Mr. Mudd: That's all I have.

Mr. Davidson: I have a question or two if I might.

40 **Examination by Mr. Davidson**

Q. You mentioned something about instructing these men, the pilots, and lecturing to them, Major. Might I ask whether the lectures you gave to the men, or some of them were given prior to May 20th, 1958, referring of course to the personnel of the 104th Fighter Squadron. but I believe that prior to May 20th I had given several lectures on Air to Air Weaponry Work.

Q. Did you during that period, so far as you can now remember, also instruct with reference to Tactics and Safety? A. Yes, sir.

Q. Can you tell us whether in your lectures you reviewed with the pilots the air space in which they were permitted to fly the T-33? A. No, sir. To the best of my knowledge I did not. I have complete faith and confidence in our Operations Officer. Almost any officer out there can give a good job on that. I thought I had and I still think at the time much more knowledge in Weaponry Work, just coming from Las Vegas. The last year I was there I was

41 Base Officer. Prior to that I had been in Weapons Work for seven years. My lectures for the first year, through all of 1958, were, at least 98 percent on the actual techniques of weapons delivery.

Q. Do you know whether any of the lectures had anything to do with the operation of the T-33 jets in or through commercial airways? A. With the exception of an instru-

ment check I don't believe I have ever gotten involved with the T-33.

Q. Do you know whether you ever discussed the basic proposition or rule of see and be seen between aircraft in any of the lectures to these men? A. Would you read that?

(Question read by Reporter.)

The Witness: Whenever I or any observed pilot as a flight leader—when I say "observed pilot," that I have observed in the last two years—well, possibly when I observe them they give more detailed instructions than they do otherwise, I don't know, but I have never observed any flight going out without the standard phrase, and this is something we have used too long, I know, but "Keep your head in the swivel and look around." This is daily—
42 multi-daily. If you fly four times a day it is done four times a day.

Q. You made some reference to your CONAC Manual. Will you state for the record what those letters stand for? A. Continental Air Command.

Q. Published by the United States Air Force? A. Yes, sir.

Q. One more thing. You mentioned that some of the inspections were done or could be done daily. Could you tell us the nature of those inspections that might be done daily? A. The term "inspections" is a little misleading. The inspections are semi-annual that we write up and they get a copy of. We use the word, both the Guard and myself, "Advisories" a lot more. If I hear from the radio or something, on my car coming back from lunch that the wind is coming up to 40 knots, or something, in the afternoon I immediately go check with them and say, "Do you know the wind is coming up?" They may have gotten the word or they may not. If they have they pull the gooney bird in. It may be two or three weeks I don't see anything I can make any comment on. I wonder how I can earn my
43 pay, and then other things you see you can make comments on, or maybe streamline or maybe make

it run a little easier, and improve, and of course, there is always personalities in on it.

Q. All right. A. I may think a problem is quite a problem and maybe it isn't a problem.

Q. Did you have any responsibility in this area as part of your work as the Air Force Liaison man with respect to pilots in the Air National Guard of Maryland maintaining proficiency in the flying and use of these planes allocated by the United States Air Force to that Base? A. I think I know what the terms "liaison" means. It is a term that you only hear used, and I will use it once in a while to a civilian——

Q. That is the least important part of the question. A. —that doesn't understand——

Q. So you can forget about that. I am trying to find out what your interests or responsibilities were, if anything, if any, in connection with this matter. A. My interest, as far as flying safety——

Q. In seeing that these pilots who are operating
44 and flying these United States Air Force planes allocated to this Base, in seeing to it that these pilots had and maintained proficiency as pilots. A. That is, in my estimation, somewhere around 70 percent of my job.

Mr. Davidson: All right.

Mr. Mudd: I have nothing further.

Examination by Mr. Pettibone

Q. Major Britton, what was the date when you were assigned as Air Force Advisor to the 104th Squadron? A. The date I believe was the 28th of January. This was not the date I started to work, however.

Q. Well, what was the date when you started to work then? A. I would estimate around the 15th of March. Did I say the 28th of January?

Q. The 28th of January I believe you said. A. I believe that's right. It would be about the 15th of February then.

Q. In 1958? A. Yes, sir.

45 Q. Well, you were assigned as Air Advisor to the Unit then before you actually began work as such, is that it? A. I hate to tell a bunch of good taxpayers all of our secrets. When you arrive to a new Base, I immediately check in, see what their requirements are. I talked to Colonel Kilkowski for maybe two hours, met some of the officers and then politely asked him for about ten days off to get located, find a house for my family, and so forth, and that was it.

Q. Well, then between the time when you actually began to perform your duties as Air Advisor and May 20, 1958 did you ever have any occasion to make a flight with Captain McCoy? A. To the best of my knowledge I did not fly in the same formation, or I know I didn't fly a T-bird with him or in the same formation.

Q. Well, I was referring to flying in the same plane with him. A. No, sir.

Q. Did you fly any formation with him where you could observe his flying the aircraft? Did you on

46 any occasion observe him fly any airplane during that period of time? A. To the best of my recollection, no. However, let me qualify that. In the 86 I flew, oh, possibly two or three formation rides before I began to know who any of the people were, with 36 pilots in the outfit. So that it could be possible, but I don't think so. I don't know.

Q. Well, in other words, if he had been one of the pilots in one of those formations you didn't know at that time. Is that what you mean? A. I don't think I ever flew with him. I'm sure I didn't.

Q. As Air Force Advisor to the 104th Fighter Squadron have you generally performed the duties for an Air Force Advisor as outlined in Section 2 of the Continental Air Command Manual 45-4? A. What does Section 2 refer to?

Q. Air Force Advisors. A. There are several sections of that book, I believe.

Q. Section 2 refers to Air Force Advisors. A. As far as any part of that manual, yes, I think I
47 have followed that very well.

Mr. Wolcott: I ask that manual be marked for identification, please.

Mr. Pettibone: No, I am not going to ask him to identify it.

Mr. Wolcott: Will you give the complete title?

Mr. Pettibone: Are you going to ask for its production?

Mr. Wolcott: Well, certainly.

Mr. Pettibone: Off the record.

(Discussion off the record.)

Mr. Pettibone: No more questions.

Q. (By Mr. Davidson) Major, may I ask you this question. Are you seated here at this hearing table today wearing a uniform of what branch of the military service? A. United States Air Force.

Q. And is that a standard uniform of the Department that you are wearing? A. Class A uniform.

Q. What insignia does it bear at this moment, sir? A. Major.

48 Q. Will you describe it? A. Major leaves on the shoulder, pilot wings above the left breast, two U.S.'s.

Q. Can you tell us whether that uniform and the insignia which it bears here is exactly the same as the type of uniform worn by the other men with whom you worked in the Maryland Air National Guard back in the first part of 1958 and particularly where the men or man held the same rank you do. Is that clear, sir? A. Not the very last, the very last couple words.

Q. All right. If there were another man in the Air National Guard of Maryland who was also a Major, was his uniform in all respects to your knowledge identical with the uniform and the insignia which you now wear? A. Yes, sir. It might be tailored a little better, a little cleaner.

Q. Yes, and as to the other officers in the Maryland National Guard, except for differences in rank, if they were of a higher or lower rank than the rank you bear, sir, were their uniforms always the same as your except for
49 the difference in the shoulder insignia? A. Yes, sir.

Mr. Davidson: Thank you.

Mr. Pettibone: Well, will the Reporter please mark this publication which is Continental Air Command Manual 45-4, United States Exhibit No. 12 for identification?

(Manual was marked United States Exhibit No. 12 for identification.)

Q. (By Mr. Wolcott) I'd like to ask the Major one question on that, if I may. I notice that that, Major, has a date 25 October 1958, and on the first page "This manual supersedes Continental Air Command Manual 45-4, 1 March 1957." Now, insofar as the description of the specific duties which is titled Paragraph 2, specific duties of the Air Force Advisor are listed below, could you look at it please and tell me if that is substantially the same as the manual which was in effect on March 1, 1957? A. Yes.

Q. So, in other words, they are substantially the same as those listed duties which were in effect on May 20, 1958?

A. Yes, sir.

50 Mr. Wolcott: Thank you.

(Examination of witness concluded.)

* * * * * * * * * * *

11

Deposition of General Winston P. Wilson. Plaintiffs' Exhibit 11

Washington, D. C.
Wednesday, September 28, 1960

Deposition of WINSTON P. WILSON, called for examination by counsel for Defendant, The United States of America, pursuant to notice, at Grand Jury Room No. 3, U. S. District Court House, 3rd Street & Constitution Avenue, Northwest, Washington 1, D. C., before Alfred F. Goldstein, a notary public in and for the District of Columbia, commencing at 10:00 o'clock a.m., when were present on behalf of the respective parties:

For the Plaintiffs GLIEDMAN, MORGAN, LEVIN, DICKSON and JOHNS:

Theodore E. Wolcott, Esq.,
36 West 44th Street,
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For the Plaintiffs CAPITAL AIRLINES and ESTATES OF MEYER AND BRADY:

Richard W. Galiher, Esq.,
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Washington 6, D. C.

For the Plaintiffs GLIEDMAN and DICKSON (Maryland case only):

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For the Defendant JULIUS R. McCOY:

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12 For the Defendant THE UNITED STATES OF AMERICA:

Russell O. Pettibone, Esq.,
3738, Civil Division,
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Allen Blumberg, Esq.,
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Washington 25, D. C.

14 PROCEEDINGS

Mr. Wolcott: By stipulation among counsel for all of the parties, it is agreed that objection as to any of the questions shall be reserved for the time of the trial, except for objections as to the form of the question only, which shall be made at this time, at this proceeding.

It is also stipulated and agreed by the parties that copies of the deposition shall have the same force and effect as originals and that filing is waived. Signing is waived except that counsel reserves the right to first check the transcript for typographical and other errors.

Is that right?

Mr. Pettibone: It is all right, yes.

Mr. Mudd: Yes.

15 Whereupon,—

Winston P. Wilson

was called as a witness by counsel for the defendant The United States of America and, having been first duly sworn by the notary public, was examined and testified as follows:

Direct Examination

By Mr. Pettibone

Q. General, would you give your home and business addresses? A. Home address: 4311 Loyola, Alexandria, Virginia; business address: National Guard Bureau, 2E326 Pentagon Building, Washington 25, D. C.

Q. General, will you tell us what your present position is? A. My present position is an Air National Guard officer, Major General, of the State of Arkansas, ordered to active duty for the purpose of appointment as Deputy Chief of the National Guard Bureau, with an additional duty as an Assistant Chief for the National Guard Bureau for the Air National Guard.

Q. When were you first appointed to this position? A. I was ordered to active duty in Washington in September of 1950, as Assistant Chief of the National Guard Bureau. I was appointed Chief of the Air Division in 1954. I was Deputy Chief initially in 1955. I was reappointed as Deputy Chief of the National Guard Bureau in 1959.

16 I have been in this office approximately ten years.

Q. And what are the principal duties which you have as Deputy Chief of the National Guard Bureau? A. The Chief of the National Guard Bureau, under the Reorganization Act of 1948, is the advisor to the Chief of Staff of the Army and the Chief of Staff of the Air Force on all matters pertaining to the Air National Guard. As the Deputy Chief of the National Guard Bureau, Deputy Chief to the Chief of the National Guard Bureau, I advise the Chief of the National Guard Bureau on matters pertaining to the Air National Guard. I am his agent as the Assistant Chief for Air National Guard of the National Guard Bureau, the other hat I wear, for promulgating, administering all programs and policies pertaining to the training, management, organization and financial support of the Air National Guard in the 50 states and Puerto Rico and the District of Columbia.

Q. As a result of holding this position, General, do you have knowledge of the National Guard organization generally throughout the United States and also of the methods of operation and its policies? A. Yes. As you know, the National Guard stems from Article I, Section 8, Clause 16, of the Constitution, which states [because this is the basis of the organization of the National Guard, I would like to read that, because I think it is important]——

17 Q. By all means, please do. A. Article I, Section 8, Clause 16, of the Constitution states, and I quote:

"Section 8. The Congress shall have Power To . . .

"16. To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."

Now, the militia, the name of the National Guard in other legislation was changed from militia to National Guard, in the Dick Act, in the National Defense Act, known through all the legislation right on up to the Armed Forces Reserve Act of 1952. In all of these laws it leaves to the states the authority of training militia under the discipline prescribed by the Congress, which is carried out by regulations, in the case of the Air National Guard, by the Secretary of the Air Force.

The Guard has two statuses, both a state and a federal status. At such times as the Secretary of the Air Force deems that there is a requirement for a unit in the Air National Guard, he advises the Chief of the National Guard Bureau. The National Guard Bureau then goes to a state and says, "We have a unit of such-and-such a type,

18 which we would like to put in your state. Will you accept the unit?" The state either says, "Yes," or "No." If the state says they will accept the unit, then the

authority to organize a unit, the state status, is authorized under the regulations prescribed by the Air Force as to what a unit has to have to maintain, to get a federal recognition. The states provide, oh, personnel, facilities, and so on, and so forth. At such time as the state feels that they have met the requirements of the federal regulations, they call for a federal inspection to determine whether they have met these qualifications, and the federal government, through the numbered Air Forces, the Secretary of the Air Force through the numbered Air Forces, or any agency he designates, goes to the unit, makes the inspection and advises the National Guard Bureau that the unit has met the requirements under the regulations to meet federal recognition. A federal recognition certificate is issued by the Chief of the National Guard Bureau under authority given to the Chief by the Secretary of the Air Force.

At that time the personnel are eligible and the unit is eligible for the receipt of federal support.

Now, we have units located in every state, Puerto Rico and the District of Columbia. They are all different types of units and the units are based on the requirements of the active establishment in the United States war plan requirements.

19 Mr. Galiher: May I ask what that is that you are reading from?

The Witness: This is an excerpt from Article I, Section 8, Clause 16, of the Constitution.

By Mr. Pettibone:

Q. Do you have any command responsibility in the military sense over National Guard units in the various states by virtue of your position in the National Guard Bureau?

Mr. Galiher: You are referring to he individually, are you?

Mr. Pettibone: Yes.

Mr. Galiher: Or his department?

The Witness: Neither the Department of the Air Force nor the Chief of the National Guard Bureau has any command jurisdiction over the National Guard when it is in its state status. The only time the command jurisdiction falls with the Secretary of the Air Force and the federal forces is when the unit is ordered or called to active duty.

By Mr. Pettibone:

Q. Who does have command authority or responsibility over National Guard units when they have not been called to active federal duty? A. That is under the commander-in-chief of the state which normally is the governor of the state, which is the governor of the state when not in active federal service.

Q. Now, could you explain to us, sir, what it means for a National Guard unit to be called into active federal duty, perhaps by giving illustrations? A. Well, there are two ways that a unit can be in the federal status. One is that the President may declare a national emergency or the Congress may declare a national emergency. At that time the unit immediately goes to full federal control and leaves all state ties behind. There is one other section of the law that authorizes the President in his wisdom to call the National Guard to active duty in their militia status or state National Guard status. He may do this at any time that he deems it necessary to augment the troops of the federal forces and during the time they are in a call, they are under the orders of the government, the promotions, and so forth, the personnel, although the federal government gives them complete direction, pace, and so forth. The only time the call has been used was in the Mexican War in which the National Guard was called to active duty and at that time, even though they were in Texas from all over the United States, they were under the state, they were still part of the state militia. The only

other time that I can think of a call is in the Little Rock situation, where, due to emergencies, the state had troops out one day and the federal government called them the next to do the opposite. When the President calls them, the President has priority for the units over the
21 call of the governor.

Q. Do you know whether or not the 104th Fighter Interceptor Squadron of the Maryland Air National Guard had or had not been called to active federal duty on May 20, 1958? A. There was no call for active duty, call or order for active duty of the 104th at that time; no, sir. They were then in their state status.

Q. Who determines the location of units, headquarters of units of the Air National Guard within the United States? A. The determination as to the exact location within a state is left to the prerogative of the state officials, provided they meet certain criteria established by regulations of the Air Force.

Q. What is the manner and method of conducting the training of the Air National Guard in the United States? A. The training of the Air National Guard is a state function, as given to it by the Constitution, which I read, which has never been changed, that portion of it which states that they are trained in accordance with that prescribed by Congress authorizes the Secretary of the Air Force for his part in fulfilling this portion to describe or prescribe the training programs and training standards to which both the Army and Air Guard units will be trained to be eligible to receive federal support.

Q. Does the federal government prescribe stand-
22 ards in any way for the training of the Air National Guard and, if so, tell us in what manner and to what extent it does so? A. Yes sir. In fulfilling the Air Forces requirements based on the Constitution the Air Force is also charged with two functions pertaining to the Air National Guard. One is the supervision of training and the inspection of the units. The Air National Guard is furnished

from the active Air Force training standards training programs of which they are graded on annually by this inspection. In the supervision of training at each one of our Air National Guard bases we have an Air Force officer called an Air Adviser. He is placed there for the purpose of seeing that the units are following the prescribed procedures established by the Air Force for the training of Air National Guard units. He advises both the Guard and the federal agency as to the method in which they are trained.

The inspection function that is performed annually (and I believe the law says an inspection will be required once each twelve months at which time they will check the status of the equipment to see that it is maintained properly) includes checking the records of the units both personnel, maintenance and supply records. They go into every facet of the organization in a similar manner that inspectors make inspection of the active Air Force units.

Now, if a unit fails to come up to those standards,
23 and normally what happens is that the state officials are advised by the federal authority or the federal inspection that the unit will be placed on probation. They are reinspected at the end of their probation period and if they don't meet the standards again, they will then be withdrawn, their federal recognition will be withdrawn and at the time the federal recognition is withdrawn, federal support of the unit is also withdrawn.

Q. Does an Air Advisor to a National Guard unit or any of the inspectors, which you referred to in your statement, have any command authority in any way over a National Guard unit? A. They have no command authority at all. The command of the Guard unit is left with the state until such time as they are either called or ordered to active duty.

Q. Just what do you mean by "left to the state"? A. To the governor of the state, as the commander-in-chief when the unit is not in active federal service.

Q. Are there requirements of the federal government with respect to how often an Air National Guard unit will assemble for training each year and the extent to which it will participate in maneuvers or other exercises? A. The law very specifically states that a minimum of 48 training periods, which we call drills, plus 15 days active duty,
24 unless the training is waived by the Secretary of the service concerned, must be performed.

Q. When members of the Air National Guard units participate in these training periods or exercises, do they receive pay and allowances or other financial benefit from the federal government? A. Yes.

Q. Would you explain how that works for us, please? A. A member of the Air National Guard or Army Guard or Ready Reserve unit, Class A unit of the Air Force Reserves, for each training period, receives one day's pay, basic pay. If he is on flying status, he receives flying pay, provided he is flying during the period or has so much flying time. He receives no allowances, such as quarters or subsistence. He receives his basic pay and longevity pay and has a flying pay if he is a pilot.

Q. That, I take it, would apply in the case of a rated flying officer? A. That is correct.

Q. Because of your position, do you know what status Captain Julius R. McCoy held on May 20, 1958, in the 104th Fighter Interceptor Squadron in the Maryland Air National Guard? A. He was a federally recognized captain of the 104th Squadron. He was also a captain in the Air Reserve Forces, and was a rated pilot, and on flying status.

25 Mr. Pettibone: Could I ask the reporter to read back that part of the answer that relates to the Reserve status of Captain McCoy.

[The portion requested to be read was read by the reporter.]

Mr. Pettibone: Off the record.

(Off-the-record discussion.)

Mr. Pettibone: On the record.

By Mr. Pettibone:

Q. When you used the term "Air Reserve Forces," in your answer to my last question, General, were you referring to Captain McCoy's status as a member of the Reserve of the Air Force as distinguished from Air Force Reserve status?

Mr. Mudd: Objection as to form.

Mr. Galiher: I object to this question. You are now cross-examining your own witness and asking him leading questions.

Mr. Pettibone: I will withdraw the question. I believe the objection may be well taken.

By Mr. Pettibone:

Q. General, will you explain what you mean by the term "Air Reserve Forces" as you used that term in your answer to my last question? A. Under the Armed Forces Reserve Act (1952), they established a common re-
26 serve appointment, making all officers of the Air Force Reserve and the Air National Guard having a common appointment as a Reserve of the Air Force. In the Air Force under this law you have two components, one is an Air Force Reserve and one is an Air National Guard. In doing that, prior to this act, a man had to be discharged from the Air Force Reserve if he got into an Air National Guard or he had to be discharged from the Air National Guard if he went into an Air Force Reserve. But under this law it gave a common federal appointment as a Reserve of the Air Force for all offices of both the Air Force Reserve and Air National Guard, which allowed transferrability between the two components without having to discharge anyone, be discharged from one or the other to join the other one.

Q. Where and how do the Air National Guard units receive their equipment, material and funds? A. If you mean by equipment aircraft, aircraft are furnished by the active

establishment to meet programs established by the Air Force. There is an annual budget which is prepared in my office. I defend the budget before reviewing authorities and before Congress. The appropriation of funds to pay for materiel support, parts, and so forth, necessary to support the Guard is funded from active Air Force funds. The financial support and the pay of the personnel is funded through appropriations appropriated by Congress for the support of the Air National Guard.

27 Q. What are the property and fiscal officers? How are they selected and appointed? And what are their duties and functions? A. Due to the fact that there is federal equipment and federal funds being apportioned or allotted to the states for the maintenance of the operations of the National Guard, under the law, there is one officer appointed in each state who is the United States Property and Fiscal Officer for both the Army and the Air National Guard within that state. He is normally recommended for appointment by the governor of the state. His application is reviewed as to his qualifications by the National Guard Bureau and if the National Guard Bureau finds that he is qualified, they recommend to the Secretary of the Army or the Air Force that this gentleman be called to extended active duty for the purpose of fulfilling the functions of the United States Property and Fiscal Officer within the state.

Q. Who was the USP&FO for the state of Maryland in 1958? A. I don't have his name.

Q. Do you know whether or not he was appointed, selected in the manner which you have just described for Property and Fiscal Officers generally? A. Regardless of who he is, that is the procedure that is used as established by regulations.

28 Q. When property or equipment is ussed to a National Guard unit, who has title of such property? A. I would say that the title of the property actually remains with the federal government, but the responsibility

for maintaining the property to certain standards is a state responsibility.

Q. If property is lost, damaged or destroyed, are the states charged for it? A. there is a report of survey made on the equipment. If it is found by the board of survey that the responsibility was the state's, that the loss of the property was due to negligence or some such cause, the state is responsible for the cost of the property.

Q. How do you classify, in general, personnel assigned to the various Air National Guard units in the various states? A. We have two classes of personnel with officers and airmen. In addition to that we have a certain group known as air technicians.

Q. With respect to officers, do they have rank in the military sense? A. Yes, that is right. In other words, when the Air Force authorizes a unit to be organized in the Air National Guard, they have unit manning documents which are similar to a similar type unit of the active establishment, which calls for the ranks of a similar unit in
29 the active service. For example, a fighter squadron commander is a lieutenant colonel and in the Guard a fighter squadron in the active tactic fighter unit or Air defense unit is a lieutenant colonel. And the grades are established based on the functions he will do when he is in the Guard unit, the same as in the active duty establishment, so when the National Guard comes to active duty, they will be organized in the same manner as those in the active duty units. One portion of the Guard regulations says they will be organized in a similar manner as those units on active duty.

Q. How are these qualifications for officers in Air National Guard units prescribed or who prescribes them, perhaps I should say? A. The requirements for the Air personnel of the Air National Guard are prescribed by Air Force regulations and Air National Guard regulations. Where it is possible, the Air Force regulations are used in toto, but due to the peculiarity of the Guard being both a

state and a federal force or carrying a dual mission and having dual appointments, there are Air Guard regulations to supplement Air Force regulations. For officers of the Air National Guard, as the Constitution says, it reserves to the right of the governor to appoint officers. He may appoint any officer he desires, provided they meet a federal recognition board and are qualified under the standards prescribed by the Air Force for that grade and
30 This officer can be appointed in the state. He makes application for federal recognition. He goes before a board which is a federal board on orders from federal agencies. If he is found to meet the qualifications by this federal board, his application is forwarded to the Chief, National Guard Bureau, who forwards them to the Secretary of the Air Force, and he receives a Reserve of the Air Force appointment; that is, if he is not a Reserve officer. If he is a Reserve officer, under the common federal appointment, under the Armed Forces Reserve Act, and he holds, say, a captaincy in the Reserve, he can transfer over as a captain in the Air National Guard under his common federal appointment as a Reserve of the Air Force.

Q. Who actually makes the appointment of an officer in the Air National Guard? A. The initial appointment is by the state officials, if he is going to be a member of an immediately recognized Air National Guard unit.

Q. Does any federal agency or board require the appointment of any officer by the state officials? I mean is it possible for any federal agency or board to require the appointment of an officer by the state officials? A. I would say if a federal agency tried to appoint an officer in the Guard that was no acceptable to the Guard itself, it would be unconstitutional, because it reserves to
31 the governor the authority to appoint the officers. He can appoint whomever he wants to, but if he is going to receive federal pay, he has to meet certain criteria to receive federal pay.

Q. May the governor of a state appoint an individual who has not received federal recognition? A. Certainly.

For example, we have several adjutant generals of the State appointed at the grade of major general who do not receive any federal pay and are not federally recognized.

Q. Does federal recognition have importance or significance for any reasons other than pay purposes? A. Well, I would certainly say that other than pay purposes, it makes him eligible for receiving pay, it also makes him eligible to be a Reserve of the Air Force and subject to call by the President or call or order by the President to active federal service. If he had a unit that was not with people federally recognized, they could not be called or ordered by the President to active duty in an emergency, because the only time the President gets these people or the federal government gets control of these people is when they are ordered or called to active duty.

Mr. Galiher: I move we strike that answer as not responsive.

Mr. Wolcott: I will join in the motion.

32 Mr. Pettibone: Of course, I object to the answer being stricken. I feel it is responsive to the question.

By Mr. Pettibone:

Q. Is there a recruiting system of some kind that is utilized for procuring officers in the—well, officers and other personnel—Air National Guard units? A. The state is responsible for the recruiting of all personnel, officers and airmen for the Air National Guard.

Q. Do the states, do you know whether the states have a system that they follow in recruiting personnel for the Air National Guard? I don't mean to have you describe it to us, but tell us whether the states have systems for recruiting? A. Certainly. Each state has a system. You see, to maintain their federal support, they have to get certain numbers of personnel within certain periods of time to bring up their manning level. In other words, a unit is no good unless it has people. It is the responsibility of the state to see that it is manned properly. The state is re-

sponsible for the recruitment of officers and airmen personnel. I don't think there is any one standard by any state. I think it depends on the individual states, the unit commanders, and so forth, as to the method they use to recruit personnel.

Q. When an officer or airman has been appointed to the Air National Guard, who has control or command
33 responsibility or authority generally over the individual in that status and how does that operate? A. When not in the active federal service?

Q. When not in the active federal service. A. The state officials, normally the adjutant general, who is Chief of Staff to the governor, establishes the policies. The training standards are furnished by the active establishment and he normally, the the adjutant general will pass on his policies and personnel policies and training procedures to the unit commander and the unit commander will be responsible for the training of the personnel in the Guard.

Q. Are there any federal officers or agents or employees who have any authority or control over these individuals in any way when they are in this status? A. When they are not in active federal status, there are no federal agencies that have command jurisdiction over these people.

Mr. Galiher: What do you mean by command jurisdiction?

The Witness: Well, shall I answer that question?

By Mr. Pettibone:

Q. Yes; that is all right. A. By command jurisdiction, be able to order this man to do this job at this time. In other words, I am a commander in an Air National
34 Guard unit, I say, "You fly this time, you do this work, you sweep this area, you wash this dish, you do this." If he doesn't, he is insubordinate to the commander and he has the consequences to pay. It is a direct command by issuance of orders to the individual with which he must comply.

Q. May an officer in an Air National Guard unit hold a rated flying status. A. Certainly.

Q. Does this affect his pay in any way? A. Yes, it affects his pay, because any officer who is on valid orders for flying, receives hazardous-to-fly pay, which is known as flying status and flying pay.

Mr. Wolcott: What kind of orders?

The Witness: Hazardous flying orders.

Mr. Wolcott: You said something like "ball of orders."

The Witness: Valid orders.

By Mr. Pettibone:

Q. Does the fact that he holds a rated flying status in any way change his status otherwise as an officer of the Air National Guard; that is to say, of other officers of the Air National Guard who are not rated flying officers? A. No; he normally can fill a position requiring a rated or nonrated position, either one, provided he is qualified, of course, in the job that he holds.

35 Q. I believe you mentioned, General, that in addition to officers and airmen the personnel of an Air National Guard unit also includes certain civilian employees. These, I believe, are called Air technicians; is that correct? A. That is correct.

Q. What is the general purpose or policy behind the employment of such civilians by the Air National Guard units? A. Air technicians are what we call the full-time civilian personnel who are placed there to maintain federal equipment and records to the prescribed standards of the Air Force that cannot be maintained by the normal personnel assigned to the active establishment, I mean to the active Guard unit.

For example, we have some 72,000 personnel, officers, and Airmen, in the Air National Guard. About one out of five, or 19 per cent are full-time civilian employees of the state. In addition to being civilian employees——

Mr. Wolcott: May I interrupt. You say of the state?

The Witness: That is correct.

Mr. Wolcott: Of the State Air National Guard?

The Witness: As a state employee.

Mr. Wolcott: I see.

The Witness: I am not talking about his National Guard status. I am talking about his civilian status.

36 Mr. Wolcott: I am sorry.

The Witness: Of this, 19 per cent, which amounts to some 13,000-plus, all of these personnel, with the exception of certain Grade-3 typists, must be military members of the organization. Some states require that all be military members of the organization. There has been some exceptions on the lower-grade typist, where we are unable to get military members of the unit to type. But in general, all of them were military members of the organization. This is necessary. These are the key personnel that do the maintenance. Sixty-five per cent of the technicians are in the maintenance, radar, radio, specialties, such as sheetmetal work, machinist, and so forth, that are highly skilled capable people in order to maintain the equipment. I each of these organizations we have certain officers who are also technicians, although the greatest bulk of them are Airmen.

In the officer position we have the base commander, the operations training supervisor, flying training supervisors, the maintenance personnel, the supply officers, the biggest bulk of them being Airmen. They are there for the purpose of maintaining the equipment. They are employed by the state. The state has the authority to fire and hire. The funds for the pay of these personnel is allotted to the USP&FO. We give them a maximum pay scale by job title, and it is up to the state to determine what pay he

37 receives. They can either pay what is authorized.

In many cases many states do not pay the maximum that is authorized. They pay that portion that is comparable to the other jobs within the state for each type of job. In several instances the states augment the pay by adding purely state money to the federal money. We set the maxi-

mum, but the state can augment it. The USP&FO prepares the necessary vouchers on the pay, but the vouchers are paid by the orders that are issued by the state officials, and the amount of pay is that prescribed by the state officials. It cannot exceed the amount that has been established and given to the state for a specific job. It is just the same thing as if the federal government, through the National Guard Bureau, contracts with the state for the maintenance of this equipment and puts the strings as to how the people will be employed, in what type of jobs they will be employed.

This is a recommendation to the state, and it is up to the state to pay the maximum, and they are allowed so many man-years, and it is up to them to live within the man-years, and the money authorized by our regulation.

By Mr. Pettibone:

Q. Who supervises the daily work of their employees in their respective positions? How is that handled? A. Normally the adjutant general authorizes the base commander, who is his representative on the base, to do the supervision of officers and Airmen assigned to his base on
38 state orders.

Q. When you use the term "adjutant general," whom are you referring to? Could you define that a little more specifically for us, please? A. Normally, in each state, except in a few, the military codes of the state determine that there will be an adjutant general and that is what it is normally called under their codes, which is the adviser to the governor on matters pertaining to Army and Air National Guard. He is the representative with whom we primarily deal. When I deal with the states, I deal with the adjutant general. In New York, they don't call him an adjutant general. They call him Chief of Staff.

In New Jersey they call him Chief of Staff. For all intents and purposes he is the same thing as the adjutant general, which is, by far, the bulk of the people in the states with whom we deal directly.

Q. What do they call him in the State of Maryland? A. He is called an adjutant general under the military code of the State of Maryland.

Q. Do you know who held the job in Maryland in May of 1958? A. Major General Milton Reckord.

Mr. Pettibone: Have you heard of him, Mr. Mudd?

Mr. Mudd: I have heard of him.

39 By Mr. Pettibone:

Q. Who establishes working conditions and hours of work and things related thereto for these civilian employees of the National Guard units? A. That is usually established by the adjutant general and passed down to the other people who do the supervision of the work for the adjutant general.

Q. In 1958 do you know whether or not the state of Maryland followed the general method of operation which you have just outlined for the various states? A. I would say that they did, yes.

Q. Who has authority to promote civilian authorities of the various National Guard units? A. The state officials, the adjutant general in this case, representing the governor, is the one who determines the grade and the status of the civilian employees within the state.

Q. Who has authority to discharge or terminate the employment of such civilian employees? A. I would say the adjutant general of the state issues the orders.

Q. Who gives these civilian employees their specific work assignments in connection with their employment? A. It is normally done under the policy of the state by the base detachment commander.

40 Q. Does any federal agency or department, through its own employees or agents, have authority to give work assignments to any civilian employees of these Air National Guard units? A. Definitely not.

Q. As a matter of fact, does any federal agency or department, through its officers or agents or employees, have

the authority to promote, discharge, control the working conditions and control generally in their daily work these civilian employees? A. No, sir.

Q. Are the Air National Guard civilian personnel included in the federal civil service retirement system and entitled to the benefits thereof? A. No, sir.

Q. Do you know whether or not the Air National Guard civilian personnel are covered by the provisions of the Social Security Act and entitled to the benefits therefrom? A. They are, provided the state authorizes it.

Mr. Mudd: Just enter my objection, please.

Mr. Pettibone: Do you object to the form of the question?

Mr. Mudd: Yes. Well, actually I do not object to the form, but I think you are calling for a conclusion, a legal conclusion of a lay witness.

41 By Mr. Pettibone:

Q. Answer the question. A. What is the question?

Mr. Pettibone: Please read the question, Mr. Reporter.

[The question was read by the reporter.]

The Witness: It depends entirely on the decisions within the state whether or not they will be included. Some states have systems where the Air technicians being state employees are covered under the state retirement plans. Most states, they are under the Social Security benefits.

By Mr. Pettibone:

Q. Federal benefits? A. Yes. Social Security.

Q. Are deductions made from civilian employees in Maryland, in the Maryland Air National Guard, for the employee's contributions, part of the contribution to the Social Security program? Do you know whether that is done? A. I am not familiar with that at all.

Q. I see. All right. Now, you have stated, General, that civilian personnel are normally, usually, members of the Air National Guard of the state in which they are employed. A. Yes.

Q. Do you know whether that is true in the State
42 of Maryland? A. Yes.

Q. Was it true in 1958? A. Yes.

Q. Do such civilian employees also engage in the training programs of the Air National Guard for the military members thereof? A. Right.

Q. And in what status do such civilian employees participate in these training programs? Will you describe to us in general how this works? A. As we have stated, Air technicians are military members of the organization, and they are required to participate in the training programs as scheduled by the state officials for their 48 drills, their 15-day field training.

Q. Do they participate in their military status or civilian status? A. They participate in their military status as members of the military organization during unit training assemblies.

Q. Do they participate in their military status exclusively, as distinguished from their civilian status or not?

Mr. Mudd: Objection. Leading.

Mr. Pettibone: I will withdraw the question.

By Mr. Pettibone:

43 Q. May they participate in their training exercises in their civiilan status. A. That is true.

Mr. Wolcott: The answer to that is "Yes"?

Mr. Mudd: True.

The Witness: Yes.

By Mr. Pettibone:

Q. Under what circumstances may they participate in their civilian status as distinguished from their military status? A. They can participate in their military training status, being technicians, normally at the discretion of the base detachment commander, either flying—normally it is in flying status, where a man is a pilot under all competent regulations of the federal government and if the

base commander so desires, he may participate in that, for which he receives no pay when participating as a civilian member of the organization.

Q. I believe in your earlier testimony you mentioned manning guides for civilian employees. Can you tell us just what manning guides are and what they provide and just what their purpose is? A. We establish manning documents or a guide to the states which gives the job description of the way the people should be employed,
44 based on the type of equipment and the necessary workloads of the state in maintaining the equipment and the records in the said status necessary to qualify under the regulations of the Air Force.

Q. Could you classify the positions listed in the manning guides generally and by categories for us? A. There are normally two categories—a category for maintenance and a category for administration.

Q. What is the difference between those two? What are the characteristics of each perhaps? A. For example, your base detachment commander is normally the supervisor of the base for the adjutant general in which he is responsible to see that the equipment is being maintained, the records are being maintained, and that the work established for the unit is being accomplished on a day-to-day basis. Administrative procedures, such as clerks, typists, personnel records, are being maintained. Supply requisitions are issued, and so forth.

So they are either in maintenance or administration. Those are the two categories of personnel. In addition, you also have in the officers the base commander, a maintenance supervisor, an operations training officer, flying training supervisors, you have supply officers, and then in the Airmen you have all the necessary skills necessary to maintain the equipment.

Q. Have job descriptions been set up for these
45 various jobs? A. Yes, it is in the Air National Guard Regulation 40-01, I believe.

Q. Do any of the job positions require that the person holding the position have the status of a rated flying officer? A. That is correct.

Q. Can you recollect any particular jobs which have this requirement? A. We recommend as mandatory the Operations Officer, the two flying training supervisors, the maintenance officer, he can be either way, he can or he can't. The supply officer may be rated, but he is not necessarily required to be rated, and all the officers assigned can be rated, but not necessarily, but we do require as a condition of their employment that the Operations Officer and the flying training supervisor be rated.

Q. What about a maintenance supervisor, is it required that he be rated? A. Not necessarily. We recommend that he be rated, but not necessarily as a requirement.

Mr. Wolcott: Is your recommendation mandatory?

The Witness: No, sir. We have 92 maintenance supervisors authorized in the Air Force. We have 56 of them rated. Thirty of them are not rated. The balance I don't know because I don't have a record.

By Mr. Pettibone:

46 Q. What about an aircraft maintenance chief? A. Aircraft maintenance chief can either be an airman or an officer.

Q. Is he required to be rated or is it desirable that he be rated? A. If he is an officer, it is desirable that he be rated.

Q. But not mandatory? A. Not mandatory.

Q. Did these provisions for these positions you just described apply in Maryland in the jobs there of the Air National Guard of that state in 1958? A. That is correct.

Q. First of all, how would an officer in an Air National Guard unit get a rating as a flying officer. What is such a rating and how does one get it? What is the priority? A. The only way he can be rated as a flying officer is to have completed the necessary flying school with the Air

Force or the Navy and be given a rating as a qualified officer who is required to participate in frequent aerial flights.

Q. Well, what is the rating itself? Is it something in writing? A. He is issued, once he completes the
47 necessary training, flying status orders, which authorizes him to participate in frequent aerial flights.

Q. Are there different classifications in any way and under different categories or is this just one blanket thing a person gets? A. You have three different classes of pilot. You have a normal pilot who has had less than 10 years experience. You have a senior pilot with so many hours and more than 10 years experience. You have a command pilot with 16 years and so many hours of experience. But the basis of all of them, since 1950, they have to come from flying school through the flying training system of the active Air Force.

Q. Now, after an individual receives a rating in this manner, is that a lifetime privilege or does he have to do anything to maintain it and continue it? How does that operate? A. A member of the Air National Guard to maintain his pilot's rating must participate in frequent aerial flights to the extent that he must fly a minimum of 100 hours a year. So much of it must be instrument and so much of it must be night. If he fails to qualify during a year's time, he can be placed before a flying evaluation board. If it is the board's determination (and it is normally in the Air Guard a state board) that he remain on flying status or that he be taken off, they are re-
48 viewed by the National Guard Bureau who is acting for the Secretary of the Air Force, which either upholds or doesn't uphold the findings of the board. If the board's findings and representations are that he should be removed from flying status and they are concurred in by the Guard Bureau, then he is removed from flying status and orders are issued. If he is maintained on flying status after the board has made a recommendation, then his original orders remain valid.

Q. How does a person who holds a flying rating go about getting the number of hours required each year to maintain his rating in the manner you have just described? How does he do that? A. Normally an individual in the National Guard who is attending the 48 drills and 15-days field training gets 1/30th a month's flying pay for each drill he puts in. Four drills a month require him to fly for pay purposes 96 minutes. But to maintain his currency under Air Force regulations, it amounts to an average of 8 hours a month or 12 times 8 or 96, which gives him a little over 8 hours a month to maintain his proper efficiency in order to keep from having to appear before a flying evaluation board. So much of this time must be night and so much of it must be instrument.

Q. Do these requirements which you have just described apply equally to civilian employees of the National Guard units, these air technicians which we have been talking about as to people who are not employed in such manner? A. They apply to all military members of the organization and since these technicians are military members of the organization, it applies to them in their military status, yes.

Q. Then does a civilian employee of a National Guard unit who holds a rating as a flying officer have to comply with these requirements the same as other members of the unit, the military members of the organization? A. Required to do the same as the military members of the organization.

Q. Did these requirements apply in this same way to Julius R. McCoy of the 104th Fighter Interceptor Squadron of the Maryland Air National Guard in 1958? A. That is correct, they did.

Q. So as the holder of a pilot rating, it was necessary for Captain McCoy to engage in aerial flights during that year in order to maintain his rating? A. Correct.

Q. Now, in order to maintain the rating, was it necessary for Captain McCoy to make aerial flights? A. Yes.

Q. Now, Captain McCoy in May of 1958 was a Captain of the Maryland Air National Guard assigned to the 104th Fighter Interceptor Squadron; is that correct, to
50 your knowledge? A. Yes, to my knowledge, that is correct.

Q. And he was also a civilian employee of that unit at the same time, wasn't he? A. That is correct.

Q. Now, did he perform any aerial flights in May of 1958? A. Yes.

Q. Did he perform one on May 20, 1958? A. Yes.

Q. In order to fly as pilot an aircraft assigned to an Air National Guard unit, does an individual have to have any special authorization or license, shall I say, for such a purpose? A. I don't believe I quite got you. License?

Q. Well, what gives an individual the right to fly a military aircraft assigned to an Air National Guard unit? Can just any individual fly such an aircraft or is it restricted to certain individuals? A. It is restricted to only those individuals who have a valid flying status orders issued by the Air Force for the purpose of flying frequent aerial flights.

Q. Will that have any relationship to the appointment of the individual to status in an Air National Guard unit, for example? A. Certainly.

51 Q. What would that relationship be? A. In other words, you have established by your manning document certain positions that require a boy to have a valid flying status rating. In other words, if he is a tactical pilot holding a tactical seat in the organization, he has to have a valid pilot's rating. There are other positions that are authorized in the unit manning document, where an individual can be either rated or non-rated.

Q. Well, does he receive his rating by virtue of his assignment to a position in the military unit? A. Not necessarily.

Q. Is there any relationship, though, between the two? A. Based on his qualifications and the requirements for the job; for example, a supply officer, if he is qualified as

a supply man can be rated or nonrated. It doesn't make any difference. I think you have seen here quite a bit, they are taking a number of people off flying status, in the paper just the other day. All those people that they are taking off are not in tactical pilot seats, they are in other positions. I have people working in the Bureau who, by their job, are not required to fly, but they hold pilot ratings and, as such, they are authorized to fly. They have valid requirements to fly.

Q. All right. When an individual holds a rating
52 which authorizes him to fly, what is the mechanics of going about getting an airplane and engaging in a flight? How generally is that handled? A. When a man comes into an organization, he is assigned to either, regardless of the position, based on his flying status, valid orders, he is required to participate in flights and those are normally scheduled by the base commander for these people who are required to fly. He establishes a schedule as to when these people should fly and how much time they should fly per quarter because we allot 125 hours of flying per year for these pilots in each state and we support them to that extent.

Q. Now, are any orders, formal orders, issued with respect to such flight? A. Each time the guy is flying, there is an operation order issued by the unit which shows the flight, what it is for, and so forth, there is a definite operational order issued on each flight.

Q. Do such orders refer to a specific individual and specific flights? A. By name, serial number, member of organization, yes.

Q. Well, now, suppose you have an individual who is both an air technician employee, a civilian employee, and an officer member of a National Guard unit, how
53 would the orders refer to the individual? A. It would refer to Captain John Doe, AO such-and-such, assigned to such-and-such organization.

Q. Would it refer to him in his civilian employment status in any way? A. No, sir.

Q. Why is that? A. When the man steps into a cockpit, regardless of whether he is a civilian or military member of the organization, the only way he gets his pilot rating is by being a military pilot on valid orders. When he steps into that cockpit or when he writes his form, his local clearance or his form 175, if he is leaving the base, which is his clearance authority, he doesn't write Mr. John Doe. It is Captain John Doe, AO, such-and-such and assigned to such-and-such a unit, and that is listed on his clearance. When he gets in there, his forms are listed as Captain So-and-So, assigned to such-and-such a unit. He is not listed as "Mr." And he is flying in his military status as a military rated pilot of that organization.

Q. Did these principles and regulations control with respect to the Maryland Air National Guard in 1958? A. Yes, sir.

Q. Did they apply to Captain McCoy in the flight
54 he made on May 20, 1958? A. It applied to Captain McCoy in the flight he made on May 20, 1958; yes, sir.

Mr. Pettibone: I have no further questions for the General.

Off the record.

[Discussion off the record.]

[Whereupon, the taking of the deposition recessed at 12:05 o'clock p.m., and resumed at 1:45 o'clock p.m. of the same day.]

Whereupon—

Winston P. Wilson

resumed the stand and, having been previously sworn by the notary public, was examined by counsel and testified further as follows:

Cross-Examination

By Mr. Mudd:

Q. General Wilson, I have just a few questions. You stated that the United States is the owner of the aircraft

which are turned over to the various state Air National Guard units; is that correct? A. They belong to the federal government. The custody of the aircraft is in the state, but it belongs to the federal government. It is federal property.

Q. Is there any distinction in the uniforms worn by an active Air Force pilot and an Air National Guard
55 pilot or Air Reserve pilot? A. No; same one; authorized under the regulation as the Ready Reserve of the Air Force.

Q. Do each one of the states have an Air National Guard unit? A. Each state has at least one.

Q. Do some of those units operate from federal or Air Force fields? A. Yes. We have 94 installations. They are divided up between private fields, military bases. Seventy-one of them are on civilian airports. There are a total of 38 in joint use.

Q. Would you mention some of the military fields at which Air National Guard units are based? A. Hinsley, Lincoln Air Force Base, Ellington Air Force Base, Dow Air Force Base, Maine. Do you want me to go ahead?

Q. Approximately how many are there altogether? A. There are 14, and they are on joint use with active Air Force, to the best of my knowledge right now. There are two private fields.

Q. Is there an Air Force adviser assigned to each one of the units? A. Each unit has an Air Force adviser, that is right.

Q. In the annual 15-day training program which
56 I understand each one of the Air Guard units participate in, conducted at an Air Force or government-owned airfield? A. Not necessarily.

Q. Is it customary for it to be conducted at a military field? A. Not customary. Right now we are using some military and some commercial fields. For example, Alpino, Michigan, is a civilian field, at which we have a permanent training site. Boise, Idaho, is a civilian field where we have

a permanent training site. Gulfport, Mississippi, is a commercial field, where we have a civilian training site.

Q. The Alpino, Michigan, field was the field at which the 104th trained in this past summer? A. That is right.

Q. During its training period it was used exclusively by the Air National Guard? A. I would not say that is true. I have been there many times when civilian airplanes used it, used the field.

Q. This summer there were four jet squadrons training there, were there not? A. That is correct. Still a civilian airport.

Q. Coming to the air technician classification that you mentioned, I believe you indicated that the base commander was required to have a flight rating. A. No,
57 I did not so indicate. He can or he cannot. We recommend that he do.

Q. Which were the classifications for which it is mandatory that you have a flight status? A. The operations officers and the two flight training supervisors.

Q. You felt it was desirable for the maintenance officer to have a flying status? A. I think it is desirable for the maintenance officer as well as the base detachment commander.

Q. Why is it necessary that it be mandatory that the operations officer have a flight rating? A. If he is going to be an operations officer and be responsible for the operations of the unit, he has to fly with the unit. The operations officers in all Air Force units are required by the UMB to be rated pilots.

Q. Why is it desirable for your maintenance officer to be have a flight rating? A. I feel a maintenance officer should be able to check his own airplanes. I mean if I were a squadron commander, I would insist on my maintenance officer being a rated pilot. It gives the pilots, the other pilots, certainly a safe feeling if they know the guy that is doing the maintenance is also going to fly the airplane.

Q. What position as air technician did Captain
58 McCoy hold on May 20, 1958? A. I don't know the exact position. I know he was an air technician and the position, as to the exact position, I can't say.

Q. Are air technicians paid from federal funds? A. Air technicians are paid from funds allotted to the state for the purpose of paying the salaries that are authorized by the state for technicians.

Q. Is that part of their salary, whether it be in part or their entire salary if it is entirely from federal funds, given to them by a federal officer, disbursed to them by a federal officer. A. The funds, the USP&FO does not actually receive the money. He receives an allotment of funds for this purpose, for which he prepares vouchers against and which vouchers are forwarded to a finance agent for payment in making out the checks.

Q. Is it processed through him in any event? A. It is processed through him. He has no funds as such, where he can get dollars in his hands.

Q. For each one of your air technician's jobs, is there a job classification or requirement structure that is promulgated by any agency of the federal government? A. In accordance with ANGR 40-01, which is the guide for type of employment, we allot to the states the number of man-years against that. It is up to the state to determine
59 whether they want to employ all of them or part of them and what they pay.

Q. Before a person can be employed as an air technician under any one of the various classifications, he has to comply with the job requirements as promulgated by 40-01? A. We presume that he does, because that is the job description given to the state.

Q. Who passes on whether he meets the requirements or not? A. Once each year at the inspection that is a part of the Air Force inspection team to check that.

Q. The Air Force annually checks that? A. That is right.

Q. Had Captain McCoy been annually checked by the

Air Force to make sure that he met the qualifications? A. I have not seen any inspection report from the Air Force that indicated otherwise.

Q. Have you seen the Air Force inspection report that he had met the qualifications? A. There is no mention of it. Unless there was some deficiency, it would not be written up.

Q. So there is no report unless it is negative? A. That is correct.

Q. From that you presume he did meet the qualifications of the Air Force? A. That is right.

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Q. And to keep a rating you indicated that certain qualifications, requirements, had to be met, such as flying so many hours, and so on, and it is the same rating that one acquires by these qualifications that you mentioned when you speak of a maintenance chief having a flight rating which you consider to be desirable. A. That is correct.

Q. And his part of the requirement for flying so many hours aimed at maintaining the proper proficiency of the particular individual. A. Maintaining the proficiency of the individual in that type of equipment; yes.

Q. When you use the term unit manning document, is that similar to the T/O or Table of Organization? A. That is correct. That is what they call it now, that is the up-to-date term. It used to be called a TONE.

Q. Before the federal government appropriates or allocates funds for an Air National Guard unit, does the manning document have to be filled or substantially filled? A. Not necessarily.

Q. Does it have to be filled to the extent that it has sufficient manpower for what the Air Force considers to be a minimum to maintain an efficient unit? A. That is correct. It has to meet a minimum strength requirements based on a phase growth over three years for federal recognition. I believe the regulation states they must have at least 25 per cent of their personnel authorized

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enlisted by the state for the extension of federal recognition.

Q. And, of course, recruitment to fill out this minimum requirement for federal funds, I suppose, is necessary in some cases inasmuch as you mentioned the various units may conduct their own recruiting activities. A. The recruiting activity has to go along year by year, because you have people who get out of the organization due to change of residence, so it is a physical disability later on to make them require an additional person. There is continual recruiting. We recruit on the average of 13,000 people a year to maintain our strength of 72,000.

Q. Is the wearing apparel that the pilots of an Air National Guard unit wear in flying an aircraft owned by the federal government? A. If you are talking about his flying suit.

Q. Flight suit. A. Flight suit. That is issued by the federal government as an item of issue. His uniform, of course, is not.

Mr. Mudd: That is all I have. Thank you, General.

By Mr. Wolcott:

Q. General, just what is the Air National Guard Bureau?

A. The National Guard Bureau, composed of a Chief
62 of the National Guard Bureau and certain staff functions, has an Air Division or an Air Office and an Army Office. It is set up by statute that there will be a Chief, National Guard Bureau. He is charged with the administration of the National Guard, both Army and Air.

Q. Set up in federal statute? A. Yes, sir.

Q. So it is a federal agency. A. It is a special staff agency for both the Army and Air Force, right. The people who make up the Bureau are on active duty, plus the civilian employees under federal civil service employment.

Q. Are they all paid from federal funds? A. National Guard Bureau? Yes, sir.

Q. Where is the office of the National Guard Bureau? A. It is on the second floor of the Pentagon.

Q. That is where your office is? A. Yes.

Q. That is your full-time office? A. Yes.

Q. And you are paid by federal funds? A. I am paid by federal funds.

Q. And no state funds are contributed to your pay? A. No, sir.

63 Q. Or any member of your staff? A. No, sir.

Q. Or of the Bureau? A. No, sir.

Q. About how large a staff is that in the Bureau? A. I imagine that we have in the Bureau a total of about, well let's take in my own office, I have 49 military and about 65 civilians.

Q. And the location of your office at the Pentagon is also to help you keep in contact with the Air Force and the regular Army forces? A. Yes, that is correct. It doesn't necessary have to be in the Pentagon.

Q. But they facilitate the contact. A. That is correct.

Q. Is there a constant contact between your agency and the other agencies of the United States Armed Forces? A. Oh, yes, sir. Under the functions of the National Guard Bureau it requires that personnel of the Bureau be in constant contact with similar agencies of the Army and the Air Force in the development of programs, and so forth.

Q. And is one of the purposes to coordinate standards and facility of command? A. Not of command, but in establishing the policies and procedures for the administration of the Guard.

64 Q. Would you say, in a sense, that your agency is really an integrating unit, its purpose is to integrate the militia as a part of the armed forces? A. By law I am the channel of communication between the Department of the Air Force and the states pertaining to Air National Guard.

Q. You are really the integrating link? A. I don't know whether you call it integrating or not. I don't know that I disagree with the word.

Mr. Pettibone: I will object to the form of the question. It has already been answered.

Mr. Wolcott: I am trying to clarify it a little more.

By Mr. Wolcott:

Q. As I understand it, the Bureau is the link between the Air National Guard and the other parts of the United States Armed Forces? A. I am the channel of communication between the Department, the National Guard Bureau and the state.

Q. You said before the contribution of the states with respect to the formation of a militia is the appointment of officers and area of training. A. Yes.

Q. Are all other things, all other functions performed by the United States, except those two general functions?

A. The training of the organization, the organization, the location of the units are all done by the states in accordance with the regulations prescribed by the Air Force.

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Q. But everything else is done by the federal government; is that right? A. Furnishing materiel, procedures; yes, sir.

Q. Now, you mentioned a budget for the National Guard unit. Is there any part of the cost of the National Guard unit that is contributed to by the state? A. Yes, sir.

Q. What part is that? A. It is not within the federal budget, but there is a cost under a service contract with the states in which they pay 25 per cent of certain costs.

Q. What type of costs? A. Janitorial services, minor repairs to building, painting, utilities, and so forth.

Q. And none of that is reimbursed? A. That portion, as I said, is on a service contract where 75 per cent of the costs are reimbursed to the states. In other words, they pay 25 per cent, the federal government pays 75 per cent.

Q. Except for that type of janitorial service, the state does not contribute any other cost? A. Yes. It may not be exactly the state, but the state and community furnish the land necessary to put the facilities on. We buy no land or facilities of the National Guard. We either get a long-term lease or a dollar-a-year, a 50-year lease, and build the facilities, but none of the land to put

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the facilities on are purchased by the federal government. We go into a long-term lease, normally at a nominal fee of $1 a year.

Q. In other words, land is made physically available? A. That is correct.

Q. But the installations and all that are done at the cost of the federal government? A. Except for certain installations that were built prior to World War II, where the state built all of them. I am thinking of my own case in Little Rock. We built our own buildings. That was prior to the enactment of the Reserve forces facility act. Many state-owned facilities that are used by the Army and Air Guard.

Q. You mentioned the governor of the state is the commander of an Air National Guard unit. A. That is correct.

Q. Is he commander of that in the same sense that the President of the United States is commander of the Armed Forces? Would you like it to that, General? A. The state militia or the state military codes normally follow the military codes in the federal service, so the President
67 is commander and the commanding general of the troops in the federal government and the governor is the commander-in-chief, but not in federal service, of the Guard.

Q. But the operational commander of the Air National Guard unit, as I understand correctly from what you have testified before, is in the hands of officers who are federally recognized? A. That is correct.

Q. And in the event of any conflict of command or authority, the ultimate authority or command is in the federal government, is it not; is that correct? A. No, sir. The command of the units not in active federal service remains with the state.

Q. Well, all right, but is there anything to prevent the governor or the adjutant general of the state, can he prevent the President of the United States or his duly constituted representatives, from declaring an act of service?

A. The only way he can declare an act of service is under the laws of the land, where he declares a national emergency.

Q. That is right. A. And the minute he declares a national emergency, the units of the National Guard that he desires leave all state ties behind and come on active federal service.

Q. There is nothing the state can do about that, is
68 there? A No, sir.

Q. So the ultimate command is in the federal government. A. When there has been an emergency declared.

Q. Do you know who pays the rent at Martin Airport? A. The rent at Martin Airport right now is on a 50-year lease at $1 a year.

Q. Paid by the United States Government? A. As far as the 104th was concerned.

Q. That was effective as of 1958, at the time of this accident, wasn't it? A. Yes.

Q. Do you know of any instances of any units in the National Guard that have not been federally recognized? A. No units of the National Guard that are in existence now have not been federally recognized. They have to be federally recognized if you are going to put federal support into them.

Q. I didn't get the last few words. A. Get federal support, spend federal dollars, if they are supported, they have to be federally recognized.

Q. There is no such thing as separate state militia? A. I disagree with you on that.

69 Mr. Pettibone: I object to the form of the question.

By Mr. Wolcott:

Q. Is there such a thing as a separate state militia? A. It depends on the laws of the state.

Q. Have you heard of any? A. Yes.

Q. Where? A. There is one in Texas.

Q. But everything in the National Guard is federally recognized? A. Right.

Q. Does the location of a unit have to have federal approval or consent? A. By inspection.

Q. And all promotions in the unit are to have federal recognition and consent? A. Yes, if they draw the pay of a higher grade.

Q. All training in the unit is pursuant to federal procedures; is that correct? A. Federal procedures and training directives established by the designated agency of the Air Force and approved by the National Guard Bureau, and promulgated by the National Guard Bureau.

Q. And all equipment in the unit is federally supplied? A. Correct.

70 Q. And all use of the equipment is under federal direction; is that right? All federal government equipment must be used under federal regulations and according to federal regulations; for example, aircraft? A. Aircraft are used and flown in accordance with regulations prescribed by the Air Force, by the National Guard Bureau.

Q. What provision for compensation, for medical care, is made for, take in the two categories, military personnel of the Air National Guard first, and then civilian personnel? A. Well, under certain laws, it depends on when the disability actually happened as to whether it was covered. Sickness, if it is less than 30 days, if he is on duty for less than 30 days, is not covered. Certain other things are all covered under existing law for military members the same as the Air Force Reserve or any other reserve of the Air Force.

Q. So that where there is an injury while on the job, is that covered for military members? A. Yes, there is certain coverage for injuries if it is during a period of training ordered by the federal service.

Q. It is covered during a flight which may not be part—— A. I think it has been held that a flight participating under a federal mission would be covered.

Q. What type of law is that? Is that a compensa-
71 tion law? A. Now you are getting into the legal end of it.

Q. I don't want to get outside of your area, General. A. I don't know. I know there are regulations as to who is covered and who is not, and so forth.

Q. Does that generally apply to civilian personnel, too, sir? A. Yes. There are certain regulations. I can't quote you that in detail.

Q. You are not familiar with that detail? A. No, I am not familiar with that detail.

Q. All right. I have a notation here. I don't know if you will be able to answer this, General. Is there a separate agency that handles the compensation claims? A. That is an administrative agency other than the National Guard.

Q. You testified that the responsibility for maintenance of government equipment, such as aircraft is——

I withdraw that.

As I understand it, you testified that the procedures for maintenance of the aircraft are set out by the United States; is that right? A. Set out in accordance with regulations and standards by the Air Force.

Q. And you also testified that it is desirable for the
72 chief of maintenance to be rated a pilot. A. And we have so stated in 40-01.

Q. And I think you stated that that was for the purpose of checking equipment. A. That is correct.

Q. Well, now, as to the checking of equipment, just how is that done? Equipment, say, has been repaired, aircraft has been repaired or has been acting up in some manner. It might be a possible malfunction, and it has to be flight checked. Does the man go out and check it? The mechanic? A. No. The mechanic certainly checks it in trying to repair it from a ground run-up.

Q. I am talking about a flight check. A. A flight check is done by qualified officers within the Air National Guard pilot structure or technician structure, or it doesn't have to be technicians who check it. Those people who are qualified in their military status to check aircraft could do it.

Q. So that a flight officer can perform a maintenance check? A. A rated officer who is fully qualified in accordance with the regulations may flight check. I flight check an airplane at Andrews Field every time the maintenance is completed on it, and I am no maintenance officer.

Q. Certainly where the rated pilot is the maintenance officer, there is no question of his capacity to flight check the airplane, is there? A. No question.

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Q. Does the United States contribute any funds to recruiting of personnel? A. The only thing the United States contributes is that we have end funds appropriated for the Chief, National Guard, and funds for information and service officers who prepare kits as training aids or as aids to recruiting, and those are furnished from the National Guard Bureau to the states, posters, pamphlets, and so forth, that the people in the states use in the process of recruiting.

Q. In practical effect, these amount to all of the funds that are spent on recruiting for the National Guard; is that right, sir? A. Except what the state puts in itself. Sometimes the states add money to that and they advertise, and so forth, from funds appropriated by the states.

Q. You used the term "active establishment" several times. May I ask what is meant by that? A. Active establishment, I am talking about where the U.S. Air Force, where everybody is on active duty, as distinguished from a Reserve, where the personnel assigned are on active duty status.

Q. Is a reserve officer automatically federally recognized upon becoming a member of the Air National Guard? A. N[illegible] sir.

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Q. What does he have to do after that? A. You are talking about a Reserve officer?

Q. Yes, sir. A. He has to submit an application. It is forwarded to the Bureau. We will say that first he submits an application to the state. If the state decides he is wanted, his application is forwarded, with his physical, and

so forth, to the National Guard Bureau in accordance with the regulation. We in the National Guard Bureau review his past actions and even though he is already a Reserve officer, if we feel that he would not do the unit any good, we go back to the state and say, for these reasons we think you should discharge these men from the Air National Guard. To date we have had no question whether they would keep him or not. They are not able to get the complete record, unfortunately, but we are able to get it.

Q. General, you mentioned a procedure for disbursing funds for payment, salaries, and I think you mentioned some federal officer that draws the vouchers. A. That is correct.

Q. Now, the funds that he draws upon are U.S. Treasury funds, are they not? A. They are funds appropriated by the Congress.

75 Q. But the money is there in the United States Treasury and he is drawing vouchers against the United States Treasury; is that correct? A. That is correct.

Q. With reference to the loss of this aircraft in this accident on May 20, 1958, did the State of Maryland in any way contribute to the cost of the airplane that was destroyed in the accident? A. No.

Q. It has not reimbursed the federal government, in other words? A. No.

Q. Was any request made by the federal government? A. No.

Q. Is it contemplated that the federal government make any such request? A. No, sir.

Q. I will ask you, General, the same series of questions with respect to the medical care that was given Captain McCoy. Has the State of Maryland contributed to the cost of the medical care?

Mr. Pettibone: I object to the form of this question. There is nothing in the record to indicate that this witness

has said anything at all about these medical expenses.

76 Mr. Wolcott: I realize that.

Mr. Pettibone: I object to the form of the question.

Mr. Wolcott: I will reframe it.

By Mr. Wolcott:

Q. Has the federal government made any demand upon the State of Maryland for contribution to the cost of medical care or hospitalization of Captain McCoy?

Mr. Pettibone: I object to the form of the question again. There is still no foundation to show that this is a matter within the scope of this individual's responsibilities or duties and whether he has any knowledge or connection with it in any way. In the absence of such a foundation being laid for the question, I object to the form of the question. I might mention in this connection also that this is outside the scope of the cross-examination, because it was not a matter that was brought up in the direct examination.

Mr. Wolcott: Do I understand that you are limiting me, limiting my questions to the scope you covered in your direct examination?

Mr. Pettibone: I rest on my initial objection to the form of the question.

Mr. Wolcott: Because I would like the record to show that I don't intend to be so limited.

Mr. Pettibone: I am basing my objection to the form of the question. We believe we can leave the other

77 matter for another occasion. You have been outside the scope of it already, but I haven't made any objection yet.

Mr. Wolcott: I am perfectly willing for you to make your objection and note it for the record for all that has come before. I don't want to prejudice you.

Mr. Pettibone: I am making an objection only to the form of this particular question for the reason I stated, no more. That is all.

By Mr. Wolcott:

Q. General, may I put this another way, then: Do you have any knowledge of whether any demand has been made by the federal government or any of its agencies on the State of Maryland to contribute to the cost of medical care or hospitalization of Captain McCoy in this case? A. I have no knowledge.

Q. Was any demand made by the federal government for contribution, as far as you know?

Mr. Pettibone: He just answered that question.

By Mr. Wolcott:

Q. I am asking whether any demand was made. A. I have no knowledge.

Q. If any demand had been made, would you have had knowledge? A. I don't think so.

78 Q. Wouldn't it be channelled through you? A. It could possibly be handed through our office; that is correct.

Q. Where else would it be channeled? A. That is the only way it would come. I have no knowledge of it having been channeled through me.

Q. Is there any other means of channelling it through your office? A. We are the agency that it would go through. So you are asking me to swear that I know something that I do not know about. I do not know of any request for that as far as I personally know. I have 59 people working for me and they have certain responsibilities.

Q. I appreciate that, General, and I am not trying to stretch your recollection beyond reason. I know you can't possibly know about this particular item apart from the manifold things you have to concern yourself with, but, on the other hand, I am not going to examine 49 other people on your staff. A. I have no personal knowledge.

Q. I would like to make a request——

Mr. Pettibone: Far be it from me to tell you what you should do or not do. The witness stated that he does not know about it. That would settle it with respect to him. If you want to serve an interrogatory on the United States inquiring as to that, we will answer the interrogatory.

79 Mr. Wolcott: I would like to make the request—and it may save time all around—that a provision be left in this record to be filled in by your office and you supply the information and put that right in there.

Mr. Pettibone: He cannot agree to that and I cannot permit him to. You can serve the interrogatory on the United States. I can't waive the rules of civil procedure. I don't have a right to. If you serve an interrogatory on the United States, I will supply the information that you are seeking. That is the proper way to do this.

Mr. Wolcott: All right, I will do it that way.

Mr. Pettibone: All right.

By Mr. Galiher:

Mr. Wolcott: That is all I have.

Q. Who is Major General Erickson? A. Major General Erickson was the Chief of the Guard Bureau until 30 May 1958. I believe that is correct.

Q. How would you describe the relationship between the Air National Guard and the United States Air Force? A. Well, now, in what area?

Q. Operationally. A. Operationally, the only relationship there is that the Air Force under its portion of the supervision of training establishes the training standards and the training directives of which the Air National Guard is trained and inspected on.

80 Q. At the time of the CAB hearing into the accident of May 1958, you were asked this question, General: "General Wilson, as Chief of the Air National Guard, would you describe the relationship of the Air National Guard with the United States Air Force briefly operationally." And you answered that question: "Yes.

The Air National Guard, being a Reserve component of the Air Force, the numbers of units and the numbers of people are determined by the requirements of the active establishment to back up the active establishment of an emergency. At the present time we have some 24 wings within the Air National Guard of which 73 squadrons are equipped with jet fighters. All of these units have a D-Day mission with a major command in the Air Force. Now, the 104th Fighter Interceptor Squadron is a part of the 113th Fighter Interceptor Wing at Andrews Air Force Base, which is its wing headquarters. As such, it has been given a mission of a D-Day mission with the Air Defense Command in the role of fighter interceptor squadron of which it is trained and equipped." A. That is correct.

Q. Does that accurately state it? A. That is accurate.

Q. Does that accurately state the answer to the question?

Mr. Pettibone: I am going to object to the form of the question. I base the objection on the fact that you read a long passage that contains a large number of items. The question, in my opinion, is so complex and goes into such detail and calls for an answer to so many things, it is not susceptible to answer in that form. If you wish to take the items one by one and ask the witness to answer with respect to each one of them, I will not object to the form. I feel it is objectionable in this form.

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Mr. Galiher: General Wilson had no difficulty in answering the question, which is the same question I asked here today, before calling his attention to the question asked at the CAB hearing. To make sure, I will read the question back: "General Wilson, as Chief of the Air National Guard, will you describe the relationship of the Air National Guard with the United States Air Force briefly operationally?"

By Mr. Galiher:

Q. Before I ask you to answer that, was the answer I read to you from your previous testimony the answer you

would give here today? A. I would say, "Absolutely." That is the basis of the normal formation of units within the Air National Guard.

Q. Does the Air National Guard operate under Air Force regulations? A. Not entirely.

Q. What do you mean by "not entirely"? A. As I
82 explained in my initial testimony, where Air Force regulations can be made applicable in full to the Guard, we do, but realizing that the Guard is an inactive duty organization in certain channels of communication that have been established by law for it, as the channel of communication, and other things, we have to amend certain portions of the regulations, so we put out what we call an Air National Guard regulations which carries the same signature line as an Air Force regulation and is just as applicable on the Air National Guard as an Air Force regulation.

Q. When you were asked that same question at the CAB hearing, at page 375, you replied as follows: "The Air National Guard operates under those regulations, and one of my responsibilities as Chief of the Air Force Division is to promulgate Air Force regulations, Air National Guard regulations that are applicable to a fighter interceptor squadron, sir." A. That is exactly right. I promulgate Air Force regulations and Air National Guard regulations.

Q. Was Captain McCoy subject to the regulations issued by your department? A. Correct.

Q. In answer to, I believe, one of Mr. Wolcott's questions, you explained the meaning of federal recognition. A. Right.

83 Q. Do you remember that? A. Yes.

Q. May I read this to you, "In order to qualify for federal pay, an individual must be federally recognized. Federal recognition means acknowledgment by the federal government that a person appointed a commissioned officer in the Army National Guard of a state has been appointed to an authorized grade and position, vacancy, in the Army

National Guard of the United States, and that he meets the prescribed standards." Do you accept that as a proper definition of federal recognition? A. Well, I accept that. If you are talking about Air units, it would be Air National Guard of the United States.

Q. Except for that substitution? A. Yes.

Q. Federal recognition is granted by your Bureau, as is evidenced by a certain form that you use? A. That is correct.

Q. Is that called ANGB Form 3A? A. That is in the Army only.

Q. What is the form you use? A. We issue a special order in the Air National Guard.

Q. And do you have any particular designation of that order? A. No, sir, it is a special order.

84 Q. Was such an order issued to Captain McCoy? A. I think you are reading, I know you are reading from the manual on the National Guard.

Q. Yes, I am. A. The special orders were issued, the 3A is issued for both Army and Air, when we were part of the Army Air Corps. When we changed over, the special order took the place of the 3A, which may have 50 people on the same list rather than issuing one piece of paper for one officer. They are both one and the same.

Q. And whichever it was, one was issued for Captain McCoy? A. One was issued for Captain McCoy. I don't remember the date Captain McCoy got in the Guard.

Q. What does your Bureau do in keeping check on equipment belonging to the United States, which might be detailed to a particular Air National Guard? A. At the original time the equipment is allotted, it is allotted to the states by so many pieces of equipment under unit equipment lists. That is an automatic shipment from depots to the Guard units based on the type of unit and organization which is being formed. The aircraft are allotted to the units based on the type of mission that it has.

Q. What check do you make on the equipment? A. The inspections are run annually, where this is an
85 Air Force responsibility to inspect annually, at least once each twelve months, the status of the equipment.

Q. Whom did you maintain from the National Guard Bureau at the Martin Airport in 1958? A. Nobody. The National Guard Bureau has no inspection system.

Q. Did you maintain any Air Force advisors there? A. Yes.

Q. Whom did you have there at the time of the accident? A. I don't know his name.

Q. Without indicating his name, what would have been his duties? A. His duties are as advisor of the unit. His duties are to see that the unit operates the equipment, and so forth, in accordance with the standards prescribed in the training standards of the Air Force.

Q. What would he do if he felt that such standards were not being followed? A. If he felt that such standards were not being followed, it would be his prerogative to talk to the base commander and to the military members of the organization. If he didn't feel that was satisfactory, he could go through his federal channels to the Air Forces and say this equipment is not being maintained.

Q. And what would the Air Force do under those
86 circumstances? A. They would run a special investigation and find out and if it wasn't, and it was at such a status that it permitted the placing of the unit on probation or the withdrawal of federal recognition, they could so make that statement.

Q. You have reference to an air technician manning document. Am I correct as to that? A. That is correct.

Q. Would you mind telling me again, if you please, what that is? A. That is a manning document that is developed in the National Guard Bureau, based on the type of equipment and the type of records that an organization has to maintain and we furnish personnel to the states, allotment of man-years with specific job titles to the states for the employment of people by the state to maintain the equip-

ment, and so forth. Those are job descriptions set up by grades and by ratings as to how much we will pay.

Q. And the funds for that purpose are United States funds? A. They are federal funds allotted to the states.

Q. Did you have a project at the 104th Squadron called Project 448? A. I am not familiar with it.

86a Q. But a project number is assigned to funds? A. You are talking about 448 funds.

Q. Yes. A. I didn't understand your question.

Q. I am sorry. A. 448 is the allotment of funds which covers service contracts, the pay of technicians and other miscellaneous accounts. It is all allotted to the state in one allotment of 448, which covers many expenditures.

Q. And they are allotted by your Bureau? A. They are allotted by our Bureau, that is correct.

Q. Are you acquainted with Colonel Kilkowski? A. I know the gentleman.

Q. He was commander of the 104th Fighter Interceptor Squadron in May of 1958? A. That is my understanding, yes.

Q. Do you recall what his title was at that time? Do you recall that it was a lieutenant colonel? A. I am not sure.

Q. Do you recall if he was referred to as the base detachment commander? A. I believe he was referred to as the base detachment commander.

Q. Is that a description found in the Air National Guard Manual 40-01? A. That is correct.

87 Q. Was his salary paid by the United States Government from Bolling Air Force Base, if you know? A. I don't know.

Q. Was Bolling Air Force Base a United States Air Force Base in May of 1958? A. Yes.

Q. Still is, of course. As commander of the Maryland Air National Guard, was that a rank in the Air National Guard of the United States?

Mr. Pettibone: I am going to object to the form of the

question. We haven't had any testimony of the commander of the Air National Guard up to now.

By Mr. Galiher:

Q. Will you please answer it, if you can? Otherwise I will try to clarify it. A. The commander of the Air National Guard of Maryland is the Governor.

Q. When Colonel Kilkowsi gave his deposition he said in answer to several questions (and I am taking these out of context and it is difficult to follow sometimes, I appreciate that, but he said this), he was being asked concerning compensation received by him, this question was asked: "That was as a lieutenant colonel of the Maryland Air National Guard?" He said, "It was as a commander of the Maryland Air National Guard.

88 "Question. Did you have or hold any commission or status under the Air Force?

"Answer. I held this rank and it is in the Maryland Air National Guard, and it is a rank in the Air National Guard of the United States, and, as such, is thoroughly recognized by the federal government."

Now, my question, therefore, was directed to whether such rank as he had is a rank in the Air National Guard of the United States and, as such, is recognized by the federal government, as he testified. Do you agree with that? A. I agree with the fact that it is a rank called for under the manning document that a commanding officer for the 104th would hold. I do not agree that he is the commander of the Maryland Air National Guard, because that is only left to the governor of the state.

Q. Whatever his rank was, as you nderstood it, was that a rank in the Air National Guard of the United States which was recognized by the federal government? A. I am not going to be able to answer that question for the simple reason that in the state of Maryland the governor did issue to some of the people a state rank of colonel when their federal rank was below that. I am not sure as to the status, as to his status.

Q. If he said in further testimony that that was a commission in the Air National Guard, which was issued
89 by the United States Air Force—— A. I would agree that, if that was right, then that was what his rank was. If it was issued by the government as a reserve of the Air Force as a lieutenant colonel, then that would be his rank.

Q. And was that likewise true of the commission that Captain McCoy held? A. Yes.

Q. Now, holding a commission in the Air Force Reserve, was Captain McCoy required to keep up his flight training?

Mr. Pettibone: I object to the form of the question. It is contrary to the testimony that we have heard throughout this proceeding, and particularly from this witness. There has been no testimony that he held a commission in the Air Force Reserve. I therefore object to the form of the question and I direct the witness not to answer.

By Mr. Galiher:

Q. Was he required by the National Guard Bureau to fly a certain number of hours each year? A. Yes.

Q. As a matter of fact, he was paid extra for doing that, was he not? A. He received hazard-of-flight pay.

Q. Was any disciplinary action of any sort taken by your Bureau as against Captain McCoy as a result
90 of this accident?

Mr. Pettibone: One moment now before you answer that question.

You may answer the question, if you are able to.

Mr. Mudd: Let me note an objection for the record. Of course, I have no right to tell the witness not to answer.

Mr. Pettibone: You wish I would.

Mr. Galiher: I don't know why there was the hestitation that went on before the answer and the head-shaking that went on, for example from Major Blackman in the back of the room. I would like to know why that went on, Mr. Pettibone.

Mr. Pettibone: I will be glad to state the reason why I

requested a momentary delay. In order to protect the rights of employees of the government which I represent in this proceeding, and that, of course, includes members of the military establishment, in either a civilian or military capacity. We do not normally allow questions to be asked concerning the action officially taken by the United States of a disciplinary nature directed exclusively against them as individuals, if it may in some way tend to embarrass or disgrace or discredit, in any way, the individual in question. And it is for that reason, in general, agents and employees of the government, such as this witness, is now testifying, are not normally permitted to answer those questions; after consultation, however, with my ad-
91 visers from the Department of the Air Force, I was told the answer to that question, if the witness is able to give the answer, would not, in this instance, we think, in any way embarrass or discredit or reflect upon the reputation in any way of the individual who was the subject to your question. Therefore the United States has no objection and I did not direct the witness not to reply. I said he could answer. That is what caused the delay.

Mr. Galiher: It is a perfectly proper question in view of the position as to agency which the United States Government has taken in this case.

Mr. Pettibone: Well, the witness has answered it.

By Mr. Galiher:

Q. Do you happen to know if he was relieved of flying status?

Mr. Mudd: Objection.

By Mr. Galiher:

Q. Would you please answer the question? A. I have no knowledge of it.

Q. Would his records show as to that?

Mr. Pettibone: I am going to object to the form of the question. That ought to be the subject of an interrogatory to the United States. This witness is not a party to the

action and you are not taking his deposition. We are not taking the deposition on that basis. If you want
92 to know what the record of the United States contains or doesn't contain, I suggest you might submit an interrogatory to the United States, and then the government will undertake to give you an answer to that. I don't have the authority to waive the rules. This is the normal way these matters are handled under the federal rules of civil procedures, and I don't have the authority, as the government's attorney, to waive those rules in any way.

Mr. Wolcott: By way of reminder, the government has already produced for me records to show that following this accident, Captain McCoy no longer had flying status, if my reading of the record is correct.

Mr. Pettibone: I don't have any recollection one way or the other now. This case has been going on for so long and so many records have been turned over and so many depositions have been taken, I am not physically able to remember every detail. So it could be.

By Mr. Galiher:

Q. That seems like going around Bailey's barn to accomplish something which could be accomplished very readily here. Are you familiar with his record? A. After the accident?

Q. His record up to and including the time of the accident. A. The only thing I am familiar with is he
93 was a technician, he was a member of the Air National Guard up there in Maryland. He was a technician and that he was in this accident. I am not familiar with any board or anything else that has come into the Bureau from this standpoint.

Q. What sort of a technician ws he? A. He was employed in the maintenance field.

Q. And a technician under whose employ? A. Under the State of Maryland.

Q. Was he not employed pursuant to Title 32, Section 709, under the National Guard, under the law applying to the National Guard, this having to do with caretakers and caretakers and clerks? A. That is correct.

Q. Was the Air Force adviser you recall by name Colonel Van Ausdall? A. He was an adviser. I am not certain he was at the time of the accident.

Q. In any event, you had an Air Force adviser there whose name is not familiar to you today? A. That is correct.

Q. And he was at the 104th Squadron Base to provide instruction and training, was he not? A. He was there to act as an adviser in the training of the Guard unit.

Q. Under detail from the United States Army Air
94 Force? A. Under the United States Air Force, not the Army Air Force.

Q. Pardon me. United States Air Force. A. United States Air Force.

Q. And the requirements that he was there for was to make sure that the unit lived up to the requirements published by the major Air Force command, were they not? A. Training directives were published by the major Air Force command directed by the Air Force, forwarded to the Guard Bureau and promulgated to the states.

Q. And that would have meant the adviser would have been in charge of the training program at that field while he was there? A. No, sir. He is not, has no command prerogative, and is not charged with the supervision of training. He is there to assist the unit in meeting its training standards, but the major command is charged with responsibility of supervision of training and inspection.

Q. I believe you explained what would happen if they did not follow his instructions. A. That is right. He has no command authority to direct.

Q. There were certain criteria established by the Air

Force that the 104th Squadron would have to follow,
95 was there not? A. That is correct, in accordance with their training, training standards, and training programs.

Q. And it was required, was it not, at the time of the accident that a record of the status of utilization of all aircraft at the 104th Squadron base be furnished the National Guard Bureau or the Air Force, was that not a requirement? A. There is a 110 report that comes into the active Air Force and eventually gets to the Guard Bureau that shows the utilization of the aircraft.

Q. That was prepared, as far as you know, at the maintenance office? A. Normally, that is prepared by the maintenance office of the unit.

Q. Was not a copy sent to the National Guard Bureau as well as the Air Materiel Command? A. It gets to the National Guard Bureau, that is correct, and also to the major command that has supervision of training and inspection.

Q. What was the Materiel Air Command? A. Materiel Air Command?

Q. Yes. A. There is only one and that is AMC. They have suboffices.

96 Q. Was that part of the Air Force? A. Yes, that is part of the Air Force.

Q. And were members of the Air National Guard required to call at your office to discuss maintenance problems with the Maintenance Division? A. Many times they come in and discuss problems, shortages of equipment, and so forth, with my people in the maintenance division.

Q. It is a fact, is it not, that any regulations of your Guard Bureau or of the Air Force will supercede any conflicting regulation of the Air National Guard of the state? A. Of the state?

Q. Yes, sir. A. Normally, the regulations of the Air Force, which include Air National Guard regulations are effective on the unit. The units may expand on the regu-

lations as long as they comply with it and make it further restricting in their normal squadron regulations.

Q. You mentioned the flying evaluation board in response to one of the questions by either Mr. Wolcott or Mr. Mudd. I don't recall. Pardon me. I think it was Mr. Pettibone. Where is that flying evaluation board located? A. Flying evaluation board?

Q. Yes. A. Normally, it is organized by the state
97 and the unit, the board itself, the people who are on it. The reports that they submit go through channel and finally come to the National Guard Bureau.

Q. Can you overrule the recommendation of any particular evaluation board, flying evaluation board? A. The final reviewing authority is the National Guard Bureau for the Chief of Staff of the Air Force.

Q. What is the personnel of the board that has the final review? A. They are active duty officers in the National Guard Bureau.

Q. Do you recall the names of those gentlemen in 1958? A. No, sir, I do not.

Mr. Galiher: I don't think I have any more questions.

Mr. Wolcott: I have a few more questions. Do you have any?

By Mr. Wolcott:

Q. General, as a technician, did Captain McCoy's duties include flying? A. It could, yes, sir.

Q. Wasn't that part of his job description under which he was employed? A. If he were a rated officer, it author-
ized him to make that, but when he flew, he was fly-
98 ing in his military status.

Q. That isn't what I asked you, General. I asked you whether, as a technician, his duties included flying. A. We say he should be a rated officer, and I would presume, yes, that that would be one of his jobs if he were a rated officer.

Q. General, was this question put to you in the CAB hearing and did you give this answer:

"Question. General, as a technician, did Captain McCoy's duties include flying?

"Answer. As a part of his, in the job description under which he is employed, yes."

A. That is right. That is still true.

Q. General, what was the alert status of the 104th Squadron in May of 1958? A. By alert, I would like for an explanation on that.

Q. Well, again, General, I refer you to a question that was put to you at this CAB hearing, and there was no qualification of the question asked by you. I will read the question:

"Question. General, what is the alert status of the 104th Squadron?"

And I will read the answer you gave, General:

"Answer. The 104th Squadron has a mobilization assignment to the Air Defense Command. Further, it
99 has an assignment, I believe, to the 95th Air Division at Andrews Air Force Base. It is required to be able to get at least 50 per cent of its aircraft fully armed in the air in the first hour in case of an emergency or requirement by the Air Force."

Did you give that answer?

A. That is a true statement, yes.

Q. And I gather you don't want to change that answer. A. No, I don't want to change that answer. Could I go off the record just a minute and explain what I am talking about?

Q. I would prefer to stay on the record. A. No, that is a true statement at that time, that period of time.

Mr. Pettibone: Excuse me just a moment. That wouldn't be classified information in any way, would it? I am not objecting, of course. I have no idea whether it is or isn't.

The Witness: That is not classified information. That is open and on the wide board, but with his word "alert" there are several connotations that now apply that didn't apply at that time.

Mr. Pettibone: All right.

By Mr. Wolcott:

Q. General, was there an air space reserved for
100 the use of the 104th Squadron? A. As I remember, they did use Andrews area for instrument flying and for other purposes.

Q. Well, do you have any knowledge or recollection of what air space was reserved for the use of this squadron?

Mr. Pettibone: One moment. I am not objecting. I would just like to point out to the General that, if any of these questions call for the disclosure of classified information which could not be released to the public, you should so state, General, and that I think will be accepted as an answer under the circumstances, but I have no idea whether this question calls for that.

The Witness: This is not a classified question. The only thing I can say is I am not familiar with the metes and bounds of the area; normally, each squadron has an area within a 200-mile radius, just where they can practice certain maneuvers, certain procedures. I am sure Maryland had one also, but I am not familiar with the metes and bounds.

By Mr. Wolcott:

Q. The exact location. A. The exact location.

Q. I will ask you this, General. I don't know whether you may possibly be able to answer it. Was there an area of air space reserved for this squadron but which
101 was not used by it? A. I am sorry I cannot answer that question.

Q. You can't answer that? A. No, sir.

Q. Do you know who would be able to answer that? A. I imagine that Colonel Kilkowski can because that is established with the officials within the state. He would coordinate that with both the military and the civil officials on the establishment of areas.

Q. What agency has charge of reserving the air space for the use of Air National Squadrons? Would that be

done through your Bureau? A. No, that would not be. That would be done through the FAA or then at that time the CAA.

Q. I see. And would that be done through a request originating from the squadron? A. From the unit?

Q. From the unit. A. Yes. It is just possible that that is a request from the unit.

Q. What contribution to pay for the costs of the 104th Squadron did the State of Maryland make? A. I can't give you the exact dollars, but they paid 25 per cent of what the service contract amounts to.

Q. You are talking about the janitorial services? A. Janitorial, minor maintenance, and the utilities.

102 Q. That is on the ground buildings. A. Correct.

Q. But as to the squadron itself, maintenance, operation, and so on, the State of Maryland did not make any contributions? A. Did not make any contributions other than the land on which we placed the facilities?

Q. With respect to the civilian employees of the Air National Guard unit, can the United States Government effect their discharge? A. No, sir.

Q. But in practical effect, the United States Government can work the discharge by stopping the salary; isn't that right? A. If they find that the man is not meeting the requirements, they can.

Q. Right. Were the civilian employees of the 104th Squadron paid entirely by federal funds? A. The civilian employees, the air technicians of the 104th were paid from funds allotted to the state. Whether the state augmented their pay or not, I am not familiar.

Q. But as far as you know, all of the pay was from the federal government; is that correct? A. I say I don't know whether they augmented it or not.

103 Q. Would that be unusual? A. I would say not unusual, because it does happen in the states—Idaho for one, Connecticut for another, New York is another one—where a pay is augmented, funds that are allotted are augmented by state funds.

Q. That depends upon the local rate of pay? A. That depends upon the local establishment of the pay rates by the states.

Mr. Buckmaster: But you establish the pay grades?

The Witness: I establish the pay grades and the maximum the state can pay per job description. If the states want to augment that, that is their responsibility.

Mr. Buckmaster: That applied to McCoy?

The Witness: Yes.

By Mr. Wolcott:

Q. When I referred to it depending on local conditions, I meant local scales. A. The basis of the pay for a similar type job within the area.

Q. Yes, that is right. A. That is right.

Q. Are there procedures for setting up and generally the conduct of the adjutant general offices in the various states fairly uniform? A. I would say, no, they are not uniform. It varies depending on the military code of the state.

104 Q. I see. A. For example, in South Carolina, the adjutant general is an elected officer. He is a constitutional officer of the state. In some states they are appointed for six years. Some change every time the governor changes.

Q. Did your Bureau conduct an investigation into this accident? A. No, sir, the Air Force conducted an investigation.

Q. And did your Bureau participate in that investigation? A. Not as a member of the committee.

Q. In any way? A. No.

Q. Did you have an observer present at the investigation? A. I had not.

Q. Did the Bureau have? A. No.

Q. The Bureau did receive a report? A. The Bureau receives a report after it comes through Air Force channels.

Q. Did the Bureau receive a transcript of the proceedings? A. Of the board report?

Q. Of the proceedings before the board. Did the Bureau receive a transcript? A. We receive, as a federal
105 agency, the form 14 and the documents attached thereto.

Q. I am sorry. I am not familiar with Form 14. A. That is an accident report.

Q. And the documents attached to it, would that be transcript and other documents before the board? A. Yes, sir.

Q. And that form 14 and attachment is presently in the Bureau files? A. I presume that it is.

Q. That is at the Pentagon? A. That is the normal procedure.

Mr. Wolcott: That is all.

Mr. Mudd: I have nothing further.

Redirect Examination

By Mr. Pettibone:

Q. I have just a couple of questions, General. Now, Captain McCoy in 1958, up to May 20, 1958, was a rated pilot, was he not? He had a pilot's rating. A. That is correct.

Q. In order to maintain that rating, he was required to fly a certain amount of time, a certain number of hours over a specified period of time. A. That is correct.

Q. In other words, there was a federal requirement, would you say, that to maintain the rating, he had
106 to meet that requirement to fly a certain number of hours over a specified period of time. A. That is correct.

Q. Was there any federal requirement that he make any specific flight or flights within that period of time? A. That depended upon his squadron commander as to what he required of the individual.

Q. The squadron commander was Colonel Kilkowski, was he not? A. Yes.

Q. With respect to making flights, he was only required to make those that Colonel Kilkowski required?

Mr. Mudd: Objection.

Mr. Pettibone: On what basis?

Mr. Mudd: You are leading the witness.

Mr. Pettibone: He stated as required by the squadron commander. I asked him, "Was the squadron commander Colonel Kilkowski?" He said, "Yes."

By Mr. Pettibone:

Q. Was he required to make any specific flights by anyone other than Colonel Kilkowski, so far as you may know? A. I imagine if the adjutant general required him to make a flight, that he would make it.

Mr. Mudd: Off the record.

[Discussion off the record.]

107 By Mr. Pettibone:

Q. Was he required, if you know, to make any flights by any federal officer or agency as distinguished from the adjutant general or any agent or employees of the State of Maryland?

Mr. Mudd: This is directed to this particular man's own personal knowledge?

Mr. Pettibone: I said, if he knows.

The Witness: To my knowledge, my own personal knowledge, no.

By Mr. Pettibone:

Q. When he made a flight, was he required to fly in a specific aircraft, a particularly designated airplane? A. He could fly in those aircraft that he was qualified in, which were several.

Mr. Wolcott: May I ask a question while you are waiting.

Mr. Pettibone: I am not finished. Wait just a minute, please.

Mr. Wolcott: Surely.

Mr. Pettibone: I don't have any more questions.

Recross-examination

By Mr. Buckmaster:

Q. Does Captain McCoy still have flying status?

Mr. Mudd: Objection.

108 Mr. Buckmaster: You may answer it.

The Witness: I don't know.

Mr. Mudd: He said he didn't know.

By Mr. Buckmaster:

Q. You don't know whether he does or not? A. I have not seen the records on that case.

Q. You mean before you came here to testify you didn't go over his records and discuss it with counsel for the government? A. No, sir.

By Mr. Wolcott:

Q. General, does your Bureau have any function in the rating or promotion of officers? A. Any function in the rating?

Q. Rating or promotion? A. Or promotion? Are you talking about military or cilivian?

Q. Flight officers, military. A. Military?

Q. Yes. A. We play a function in the promotion once he is recommended by the state. He appears before a board and we review his record to see whether he is qualified or not in the job he has. If he is, we recommend to the Air Force for an appointment as a Reserve of the Air Force grade.

109 Q. In considering his promotion, do you go over his record? A. Yes.

Q. Does the fact that an applicant may have a history of airplane accidents affect your final recommendation? A. It depends on what the boards of those accidents revealed.

Q. If there was a finding of fault by the board, what effect does that have upon your recommendation for a promotion?

Mr. Mudd: Sir, excuse me for just a second. If, you say, there was a finding of fault.

Mr. Wolcott: If there had been a finding of fault by the board, what effect does it have upon his recommendation?

Mr. Mudd: Inasmuch as this is an abstract question, I will make no objection.

The Witness: Normally, when we find fault with an individual, I would say it would certainly have some weighted effect on the job, if flying was his primary duty.

By Mr. Wolcott:

Q. When you say "weighted effect," you mean an adverse effect? A. It would have an adverse effect.

Mr. Wolcott: Thank you.

By Mr. Galiher:

Q. What would your Bureau do with respect to
110 either Captain McCoy or anyone that you found had not been maintaining his flying? A. If he doesn't maintain his flying under the regulations, he is put before a flying evaluation board. We removed some 117 from flying status last year.

Q. You mean by that of your National Guard Bureau? A. That is right.

Mr. Galiher: Thank you.

Mr. Mudd: Could I ask one? Maybe it will be the last.

Mr. Pettibone: Certainly.

By Mr. Mudd:

Q. In answer to Mr. Pettibone's question you said that Captain McCoy, other conditions being met, could fly any of the aircraft in which he was qualified. A. Right.

Q. As aircraft maintenance chief, however, his position was to maintain all aircraft assigned to the unit. A. That is right.

By Mr. Buckmaster:

Q. As maintenance chief, it was also desirable that he maintain his proficiency and his knowledge of airplanes;

isn't that correct? A. That is correct; of all those assigned.

Q. And also he is a better technician if he could
111 fly those, I suppose. A. Correct, sir.

Further Redirect Examination

By Mr. Pettibone:

Q. General, who initiates flying evaluation boards in cases of rated pilots who fail to meet the minimums? A. Unit commander, by regulation.

Q. Unit detachment commander? A. No, the military commander. You are not checking him as a civilian. You are checking him as a military member of the organization.

Q. I see. I have no more.

Further Recross-examination

By Mr. Wolcott:

Q. I have one more question. General, in the years prior to May 1958 were reports received by your Bureau or the military of collisions or near collisions with civilian aircraft? A. I imagine they would be in the records of flying safety, yes.

Q. Weren't there a large number of reports received of collisions?

Mr. Pettibone: I am going to object to the form of the question. When you say a large number of reports, that isn't susceptible of a specific meaning. If you want
112 to designate any given number from 1 to a million, I don't object. Then he can answer.

Mr. Wolcott: I withdraw it.

By Mr. Wolcott:

Q. Were there reports received from time to time of collisions between military and civilian aircraft? A. I have not seen the reports. I understand that there were reports of which Board action was taken prior to his becoming a member of the National Guard, and I don't know what was the findings on the report.

Mr. Mudd: I ask that that answer be stricken inasmuch as I do not think it was responsive to what Mr. Wolcott had in mind.

Mr. Wolcott: A general statement.

Mr. Mudd: I do not believe he was concerned with any particular individual.

By Mr. Wolcott:

Q. I wasn't referring to Captain McCoy, General Wilson. I was referring to the general problem of collisions and near misses between civilian and military aircraft. A. Those are reported to flying safety and those reports are not in our Bureau.

Q. Was there a special program inaugurated or participated in by the Air Force with respect to the problems raised by collisions between military and civilian
113 aircraft prior to May 1, 1958? A. I don't think there was anything special about May 1958. This has been a problem we have been dealing with ever since I have been in the National Guard, especially since World War II.

Q. And hadn't that problem become more acute in the period a few years prior to May 1958? A. It has been becoming apparent ever since you got an increase in military and civilian people trying to use the same airways. This is the biggest problem we have had for years in the flying game. It isn't safe any more at all. I have had more near misses in the last ten years when I have been able to see the plane and the guy that was flying hadn't seen hide nor hair. Just three days ago I was on an assigned altitude coming out of the West Coast at 15,000 feet, and if I hadn't seen an airplane that wasn't supposed to be there because they didn't report it at all, we would have had a good collision. So the thing of collisions in aircrafts is becoming more acute now than it ever has been in the history and until such time as we can get positive control of all flying, we are going to still be faced with a problem of near misses.

By Mr. Wolcott:

Q. And it was considered acute, wasn't it, prior
114 to this accident? A. I have been working on a program of this kind ever since 1950, ever since I have been in the Guard Bureau.

Mr. Wolcott: That is all.

By Mr. Buckmaster:

Q. Could you give us the name of the Chairman of the Air Force Board who conducted the investigation into the McCoy accident? A. He is from Bolling Field. No, he is not either. I don't know his name.

Q. Do you know the names of any of the members of the board? A. No, sir, I do not. I do not have them at my finger tips right now. I can't think of any.

Mr. Wolcott: That is all I have.

Mr. Pettibone: Thank you very much, General. I believe that is all there is, then.

[Whereupon, at 3:50 o'clock p.m., the taking of the deposition was concluded.]

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8 **Deposition of Captain Julius R. McCoy, Plaintiffs' Exhibit 12**

(Excerpts)

Examination by Mr. Galiher:

Q. What is your full name and present address? A. My name is Julius R. McCoy. My address is 4 K Alder Drive, Baltimore 20.

Q. What is your age, Captain? A. I am thirty-six years old.

Q. What is your occupation at the present time? A. I am employed by the Air National Guard, Maryland, as air technician. My job title is Aircraft Maintenance Chief.

Q. What are the duties of your job? A. To supervise aircraft maintenance, and basically the supervision of aircraft maintenance.

Q. Do you have any other positions or jobs? A. I am also attached to the Air National Guard in a military status as squadron, as aircraft squadron maintenance officer.

Q. When you say the Air National Guard, is that the United States Air National Guard? A. It is defined as Maryland Air National Guard.

Q. Now, what are the duties in connection with
9 the position you have just mentioned that you have?
A. Again, this is supervision of aircraft maintenance.

Q. And can you give us a little more in detail just what that entails? A. Well, we have twenty-five F86H-type aircraft and two T33-type aircraft, and one C47-type aircraft. And my job is to see that the aircraft are maintained in accordance with proper regulations and the supervision of the people that do maintain them.

Q. Are these aircraft all maintained in one place? A. That is correct.

Q. Where is that? A. The Martin Airport, Baltimore.

Q. And was this the same situation which existed in May of 1958? A. That is correct.

Q. Now, let us go back to the first position that you spoke of that you have. Will you outline the duties that you have with the Maryland National Guard? A. I did not understand your question.

10 Q. Well, if I did not misunderstand you, I understood that you had several positions: one you indicated with the Maryland National Guard in aircraft maintenance, and then you indicated that you had another category which you also filled with respect to these planes that you have just mentioned. Am I wrong about that? A. The two jobs are identical in job descriptions.

Q. What about in the duties? A. The duties are the same.

Q. What is the reason for having two different ttles, two different job names? A. As air technician, the manning structure is not the same as the military structure, so the job titles are different.

Q. Do you receive two different salaries? A. That is correct.

Q. For the two different jobs? A. That is correct.

Q. Can you explain what those consist of? A. I don't understand you.

Q. Tell us what the salaries are and what each is
11 supposed to be for. A. You mean in amount or what?

Q. In amount and in time spent. A. The air technician job is considered a full-time job, or a day-to-day job, and the amount is approximately $7500 a year, and the military job is paid at a military rate for approximately forty-eight days a year, and I think that amounts to about $1200 a year, including two weeks of active duty for summer training.

Q. Now, then, do you take your orders from two different groups in the two jobs or do you take your orders from just one group? A. When I am an air technician, I take my orders from the Base Detachment Commander.

Q. Are you referring now to Martin Field? A. That is correct.

Q. And who is that commander? A. That is Lieutenant-Colonel Victor Kilkowski.

Q. Colonel Kilkowski is in the room at the present time, is he not? A. That is correct.

12 And in the military status, I take my orders from Major John Scott, who is the Squadron Commander of the 104th Tactical Fighter Squadron.

Q. Will you give us the full title of the squadron and what its affiliation is, please? A. The full title is 104th Tactical Fighter Squadron, Maryland Air National Guard.

Q. What is Colonel Kilkowski's affiliation? A. He is the Base Detachment Commander of the Martin facility and has the over-all responsibiilty for maintenance of the facility and aircraft, and he is air technician.

Q. His permanent assignment at the present time then is at the Martin Airfield? A. As an air technician, yes.

Q. What about Major Scott, what is his affiliation, and where is he located? A. His air technician status is as flight training supervisor, if I am correct. I believe that is his title.

Q. Flight training supervisor for whom? A. For the 104th Fighter Squadron, Air Technician Operation,
13 and he is Squadron Commander in a military status.

Q. Is this likewise at Martin Field? A. This is at Martin Field.

Q. What is the relationship between Colonel Kilkowski and Major Scott? A. Colonel Kilkowski in the military status is Deputy Chief of Staff for Air for the State of Maryland, and Major Scott becomes a Squadron Commander by the military.

Q. Does that mean that Colonel Kilkowski is Major Scott's superior? A. That is correct.

Q. When did you commence your present assignment? A. This I believe was in May 1958. I may be incorrect.

Q. What had been your flying background prior to May of 1958? A. I entered Flight School in January of 1944.

Q. What Flight School? A. Primary Air Force, Primary Flight Force, at that time the Army Air Corps at Tucson, Arizona, and graduated from the Air Squadron
14 Flight School in August of 1944, from Luke Field, Phoenix, Arizona, and remained with the Air Force, or the Air Corps, until late 1945, at which time I was flying primarily B17s, and some other incidental aircraft, T6 and T3.

Q. Up to that time you had none other than a military rating? A. That is correct.

Q. And you were terminated in 1945? A. That is correct.

Q. And what did you do in the intervening years up until 1958? A. I had no association with flying other than a very few hours in light planes. At that time I had a commercial authorization.

Q. Well, did you retain any reserve status on termination? A. Yes, I was in the Officers Reserve Corps, and

then joined the West Virginia National Guard. This is the Infantry National Guard. And in 1952, January 1952, I joined the Maryland Air National Guard, this same unit, the 104th Fighter Squadron. And in April 1952
15 I resumed flying with my military rating.

Q. Now, up to that time did you have any commercial or private rating? A. I had a commercial rating, yes.

Q. When did you get that rating? A. I got that, I think, in early 1946.

Q. And what exactly was your rating? A. A commercial pilot.

Q. What was the last word? A. A commercial pilot.

Q. And did you maintain that up until 1950? A. I held the ticket, yes. I may not have complied with the requirement, flying requirement to be current at any particular time.

Q. Well, where did you do your flying in the intervening period? A. I did just a little bit of flying in light planes from Princeton, West Virginia, and Beckley, West Virginia. Very limited.

Q. Did you pass the physicals required? A. Yes.
16 Q. Where did you take those physicals? A. In Princeton, West Virginia.

Q. But your flying you have indicated was very limited, though? A. That is correct.

Q. What type planes did you fly in the period up to '52? A. Well, I did not fly up to '52. I think I only flew in the year 1946. And they were light planes of various descriptions, small-horsepower aircraft.

Q. From 1946 until when did you fail to fly? In other words, when did you first fly in '46? A. Well, I resumed flying in a military status in April 1952.

Q. And that was after you joined the Maryland Air National Guard? A. That is correct.

Q. Did you have your reserve commission still at that time? A. That is correct.

Q. In other words, that continued right straight
17 through, I take it. A. That is correct.

Q. Now, exactly what was your rating and rank when you joined the Maryland Air National Guard in 1952? A. I was a second lieutenant pilot.

Q. And where were you stationed at that time? A. In Harbor Field in Baltimore.

Q. How long were you at Harbor Field? A. The headquarters of the 104th was at Harbor Field until I believe 1957, at which time they moved to the Martin Airport.

Q. In other words, you were with, as far as the squadron was concerned, no other squadron from 1952 up to and including the present time? A. With the exception of some Air Force schools that I attended.

Q. Now, when you started in 1952, you did not have the dual job rating that you now have? A. That is correct, it was a military status only.

Q. Did you wear the same type of uniform that
18 you have on at the present time? A. That is right.

Q. That has no Maryland Air National Guard identification on it whatsoever? A. No, sir.

Q. You have U.S. on both lapels, and that is the uniform that officers with the United States Air Force wear? A. As far as I know, there is no difference.

Q. And that, as you have indicated, is the type of uniform you have worn since 1952?

Will you give that answer?

A. As far as I know, there is no difference between the uniforms.

Mr. Davidson: The reporter may guess when you nod and put down a yes, so it is better to say it out loud.

The Witness: Yes, I will.

Mr. Galiher: Would you repeat that last question, Mr. McDonald, please, so we can be certain that we have the answer.

(Question read by the reporter.)

Q. (By Mr. Galiher) And is your answer to that question yes? A. The answer to that question is that this is the type of uniform that I have worn since 1952.

19

Q. Well, is there any difference between the type of uniform you have worn since 1952 and the type of uniform worn by persons who are in the United States Army Air Force? A. Not to my knowledge.

Q. May I also ask if the shoulder bars are similar to those used by the United States Army Air Force? A. They are.

Q. And the buttons also that you are using? A. Yes.

Q. The insignia on the buttons on your pockets and on the coat? A. Yes, sir.

Q. And the wing? A. Yes.

Q. In the left lapel, close to the left lapel, is that the same? A. That is the same.

Q. Now, then, when you started with the Maryland Air National Guard, as you have indicated, in 1952, did you have any written orders or billets? A. Can you clarify that just a little bit, please?

20

Q. Well, did you have any documents which explained exactly what your connection with the assignment was? A. Yes.

Q. Where are those documents at the present time, all documents that may have been given to you in the intervening years? A. I possibly have personal copies, and I assume that there are file copies. I could not tell you the physical location.

Mr. Galiher: May I ask you, Mr. Mudd, if you would approve my request to either furnish us with copies of them, or provide authorizations which would enable us to secure them from the proper source?

Mr. Mudd: As far as I personally am concerned, Mr. Galiher, I would have no objection. What the military requirements might be, I don't know.

Mr. Galiher: I appreciate that, and consequently I have couched my request as I have.

21 Mr. Mudd: All right.

Mr. Wolcott: Would that also apply to my group of plaintiffs, Mr. Mudd?

Mr. Mudd: I see no reason why not.

Mr. Wolcott: Thank you.

Q. (By Mr. Galiher): Do you recall what your first assignment provided in your orders? A. I was assigned as a fighter pilot, and my primary duty was a fighter pilot after a certain period.

Q. And do you recall who signed those orders? A. I do not.

Q. Where did you take your training? A. At Harbor Field.

Q. And under whose auspices? A. The squadron at that time was commanded by and is now Lieutenant-Colonel Edwin Warfield, III.

Q. With what organization is he at the present time? A. He is Chief of Staff for Air for the State of Maryland.

Q. How long was your training period? A. I truthfully don't know.

22 This type of training was on an entry level training program to upgrade to a full classified level in the type aircraft we were flying. I don't know when I achieved the full aircraft level.

Q. What type aircraft were you flying? A. That was initially the T6-type aircraft, and then the F51-type aircraft, after a short training in the T6.

Q. What type of aircraft are those to a layman? A. The T6 is a trainer aircraft, reciprocating air-conventional type.

Q. How many seats? A. Two seats. And the F51 is a single engine type aircraft.

Q. Also two seats? A. One seat.

Q. One seat. Now, then, after you completed the training, what was your first assignment and where? A. I was assigned as a fighter pilot to the 104th Fighter Squadron.

May I hold the record just a moment?

Q. Indeed you may.

23 (Discussion off the record.)

Q. (By Mr. Galiher): Were you constantly at Harbor Field on this first assignment? A. No.

Q. Where were you besides Harbor Field? A. I had a civilian job here in Baltimore, and attended drill periods or military training periods at Harbor Field, and made flights from Harbor Field on various other days.

Q. Where were you working at that time? A. I worked for the Ajax Brass Specialties Company in Baltimore.

Q. In what capacity? A. I was in production control.

Q. What exactly does that mean? A. I was responsible for scheduling machinery for certain machine operations on metal.

Q. All right. Now, how much of your time were you spending with the National Guard while you had that job? A. Well, I spent numerous Saturdays in the capacity of a pilot.

24 Q. You were working five days a week then with Ajax? A. That is correct.

Q. Now, what pay did you receive at that time? A. From what?

Q. From the National Guard. And how was it determined and what was the basis for it? A. The basis was a pay, military pay, of one day, with certain restrictions. I believe the allowances are something like that, that are not under full schedule control.

Q. Were those checks payable on the Treasury of the United States that you received in that period? A. As far as I know, they were.

Q. As a matter of fact, have you at any time since 1952 received any check for military service that was not payable on the Treasury of the United States? A. As far as I know, I have not.

Q. When did your status change from part-time to full? A. In June of 1956.

Q. In other words, for approximately four years you were on this part-time status that you have explained, which meant that you worked five days a week at a civilian job in Baltimore—— A. That is correct.

Q. —and on week-ends, on special assignments, and perhaps in the summer you were on military duty. A. That is correct.

Q. Now, during the summer in those intervening years did you go on active duty for periods? A. We had active duty for training periods of two weeks' duration each summer.

Q. And where did you train during the four summers that intervened between '52 and '56? A. In '52, we were at Reading, Pennsylvania.

Q. May I interrupt you and ask you what was the field? A. Spence Field.

Q. And whose field was that? A. I am not aware of the owner of the field.

Q. Well, I mean by that was that a private field or was that a United States Air Force Field? A. I could not answer that. There were military and civilian operations out of there. But the owner of the field I don't know.

Q. And what was your assignment? A. As fighter pilot.

Q. With whom? A. With the Maryland Air National Guard.

Q. Were there any other persons from the Maryland Air National Guard at that time? A. Other than myself?

Q. Yes. A. The 104th Fighter Squadron, as part of the —I believe the 112th Wing was stationed there.

Q. Did you have any instruction there? A. Yes.

Q. Who was giving you the instruction? A. The squadron was commanded by now Lieutenant-Colonel Warfield, and we received instructions from various people in his command.

Q. Well, Colonel Warfield is with the Maryland Air National Guard? A. That is correct.

27 Q. Were there any personnel from the United States Army Air Force there instructing and training you? A. Yes. Let me qualify and say that we had an Air Force advisor, Colonel Van Ausdall. I am not sure of the last name.

Q. Was this training program provided by the United States Army Air Force? A. As far as I know, the training program was to satisfy certain requirements published by the Major Air Force Command.

Q. Now, by Major Air Force Command, you mean the United States Army Air Force Command? A. The United States Army Air Force, or one of its subdivisions.

Q. And would that mean that the Major Air Force Command would have been in charge of the training program at that field while you were there? A. I don't believe we could have deviated from their directions.

Q. I don't understand you. I know you are trying to answer my question. Would you clarify it, please?

28 A. I will do my best.

There are certain criteria established by the Air Force that we have to satisfy in training. Now, there is no particular problem involved of not satisfying those requirements. I don't know that we could have just cast them aside and run our own training program.

Q. Were there other persons from other states taking the same training program there while you were there? A. There were. There were two squadrons from Pittsburgh, I believe.

Q. What about 1953? A. In 1953, we were at the McGuire Air Force Base.

Q. What state is that? A. New Jersey.

Q. And under some training program, one sponsored by the United States Army Air Force? A. The United States Air Force.

Q. And were there other squadrons from other states? A. There were.

Q. What about 1954? A. 1954, Otis Air Force Base in Massachusetts.

Q. Was that likewise sponsored by the U. S. Air Force? A. Yes.

Q. And were there likewise—— A. May I say something?

Q. Surely. A. The word "sponsored" I am not sure——

Q. Well, suppose you tell me what it was. I gathered from the way you explained it that these training programs were put on by the U. S. Air Force and that you and other——

Mr. Pettibone: I object to the form of the question. You are giving the witness the answer.

Mr. Galiher: Would you permit me to finish my question, and then if you object to it, you can do so.

Q. (By Mr. Galiher): I gathered from your previous answers that each year, for several years, you and persons from other National Guards and from other states would attend a training program put on at these various fields by the U. S. Air Force. Did I misunderstand you? A. As far as I know, the training program that we attended at the fields was established by the United States Air Force.

Q. Yes, sir. A. Now, whether or not they sponsored it, I am not clear on the definition of the word.

Q. Were there any instructors from the U. S. Air Force in each instance at those various fields? A. These people, their job descriptions I believe called them advisors.

Q. But apart from the job description, did you know them as officers with the U. S. Air Force? A. That is correct.

Q. And now, I think you brought us up to the Otis Field in Massachusetts in 1954.

Where did you go for training in 1955? A. Travis Field, in Savannah, Georgia.

Q. And was the program there similar to the training program you had pursued the previous summers at other bases? A. It was.

Q. Was that likewise put on by the U. S. Air Force?

A. The training requirements were established by the United States Air Force.

31 Q. And there were likewise officers there taking that training program who were in the U. S. Air Force? A. There were. There were advisors at those locations also.

Q. Connected with the U. S. Air Force? A. That is right.

Q. And likewise there were persons from other states there participating in the program like you were? A. There were.

Q. What about 1956? A. Again Savannah, Travis Field.

Q. And was the program as it had been the year before? A. It was.

Q. Now, then, was it in 1956 that you discontinued your civilian job and took a full-time job with the squadron? A. In 1955, I discontinued my civilian job, in September, and attended approximately a nine-months course at Chanute Air Force Base in Illinois, to train, to satisfy the requirements of my job as an air technician.

32 Q. What prompted the discontinuance of your civilian job and your pursuit of a full-time career at this point?

Mr. Mudd: Objection.

You go ahead and answer it. A. At that time I was teaching school in Baltimore, or in Baltimore County, and I felt that the job opportunities were better and that I would be more satisfied personally with that type of job.

Q. What steps did you take to get that type of job and how was it finally consummated? A. Well, there was a job opening, and after some discussion with the squadron commander——

Q. May I interrupt you to ask you what the job opening was and who was the squadron commander that you spoke to? A. The job opening was aircraft maintenance officer—and let me qualify that—I am not really sure of the job title for it—it may have been base maintenance officer and technician. And the squadron commander at that time—was it Scott?

Q. Well, you tell it to the best of your recollection. A. It was either Major Scott——

33 Q. —or Lieutenant-Colonel Warfield—— A. Yes.

Q. —the people that you have previously identified in the record? A. Yes.

Q. What were the duties of this position that you have identified for us? A. They were the duties of the Base Maintenance Supervisor, to supervise aircraft maintenance and vehicle maintenance and other related equipment.

Q. Where was the Base? A. At that time our aircraft operation, or aircraft maintenance operation, was at Friendship Airport in Baltimore.

Q. When you speak of "our" who are you referring to? A. The 104th Fighter Squadron.

Q. Now, then, did you have to go through any preliminary training or comply with any preliminary requirements before you were accepted? A. Accepted as air technician?

Q. Accepted for this job that you have identified
34 and explained. A. I attended the Air Force School at Chanute Air Force Base in Illinois.

Q. That is the Air Program of nine months that you pursued? A. That is correct.

Q. Can you give us the full name and description of the base at Chanute Field, Illinois? A. It is the Chanute Air Force Base, Illinois, and it is primarily, I believe, a United States Air Force Maintenance School.

Q. Did you have written orders which sent you to that base? A. I did.

Q. Do you still have those, as far as you know? A. Possibly.

Q. Would you please check, and if you have them, please turn them over to your counsel so that he can examine them.

The Witness: Will you do that?

Mr. Galiher: The record will show that. Let your
35 counsel have them.

The Witness: All right.

Q. (By Mr. Galiher): Did anyone else from the State of Maryland come to the field at the time you went there, as far as you know? A. For the same job?

Q. Or any other jobs. A. There was one airman there, one other employee.

Q. What training program did you follow? What training program did this other man pursue? A. I was pursuing the Aircraft Maintenance Officer's Course, and I believe that the course numbers were 43, 44.

Q. What about this other man? A. I am not positive about that myself. He is an electrician who was there for training in that field.

Q. Was he an officer in the National Guard, the Maryland National Guard? A. No.

Q. Either then or later? A. No.

Q. Now, this program was put on by the U. S.
36 Air Force? A. That is correct.

Mr. Pettibone: I think I will object to the form of that question.

Q. (By Mr. Galiher): All right, would you answer it, please, and you have the objection in. A. As far as I know, it is a United States Air Force Base, and they took all their training there.

Q. There was no one there in a civilian capacity conducting the training, was there? A. There was.

Q. Who was that? A. There are civilian employees there. I believe Civil Service employees.

Q. Employees of the U. S. Air Force? A. The United States Government.

Q. Well, were there any other persons there who gave you training instruction other than employees of the United States Government? A. I don't think so.

Q. By the way, how were you paid while you
37 were at Chanute Field? A. I was paid through the Air Force Finance Office at Chanute Field.

Q. You received compensation from no other source during that period? A. No.

Q. And what did your training consist of there? A. There was a course there that covered practically every area of an aircraft maintenance officer's duties.

Q. Did you do any flying there? A. I did.

Q. What flying did you do there? A. I flew the T28-type aircraft.

Q. To a layman, what kind of plane is that? A. That is a conventional type single-engine trainer, two seats, a T33-type aircraft.

Q. How many seats? You explained that before as a single-engine jet. One or two seats? A. Yes, one seat.

Q. Anything else that you know of that was there? A. There was the B25 there.

Q. Now, what did this program of training consist
38 of other than flying?

Mr. Pettibone: I object to the form of that question, too.

Q. (By Mr. Galiher) Now, please answer it. A. As I stated before, I was schooled in as many areas as possible in these nine months in the duties, and all the phases of duties of an aircraft maintenance officer.

Q. All right, now, tell us what those duties consisted of? And may I withdraw that and first say before leaving Maryland to go to that field, had you been given any outline of what these duties would consist of, or did you learn all that after getting to Chanute Field? A. I had a general knowledge of the duties.

Q. As given to you by whom? A. Not as given to me by any specific individual.

Q. What was your general knowledge when you got to Chanute Field? A. Well, sir, by being associated for a number of years with military type flying and the people connected with it, I had acquired a certain knowl-
39 edge. Specifically as to what it is, I could not answer that.

Q. Well, generally, could you answer it, please? A. The supervision of maintenance of aircraft and equipment and

the necessary coordination with other functions, such as supply and operations.

Q. When you got to Chanute Field, did you receive a confirmation of your previous knowledge, or did you find out there were many more duties and details than you had previously suspected? A. I learned that there were more, many more duties and details.

Q. What additional duties did you learn that you would have? A. I would not say that I learned there were additional duties as much as they were elaborations on the general duties and specifics in the general duties, the management problems in the supply and operations systems, and so forth, were elaborated there.

Q. Did you learn that all the property that you would maintain would be property belonging to the United States Government?

40 Mr. Pettibone: I object to the form of the question.

Q. (By Mr. Galiher) Please answer it. A. I don't recall any class that specifically pointed this out. The procedures that are taught with reference to the maintenance records themselves indicate that the property is Air Force property.

Q. Did you have to pass tests in the training course? A. I did, yes.

Q. In the assigned course? A. Yes.

Q. And did you have to stay there until you finished certain courses and passed certain examinations? A. Yes.

Q. Or was the course terminated at a previously set date, that is, at a certain time? A. I believe the course was scheduled in at a specific date. However, certain tests had to be completed within that date. There was some allowance for other variables.

Q. And you were at Chanute Field from start to finish? A. With the exception, I believe, of my trip to Baltimore.

41 Q. What was that for? A. I came back to Baltimore to get my family and took them back with me.

Q. I see.

Now, did you successfully graduate in the various courses required of you? A. I did.

Q. And when did you come back to Baltimore? A. I came back in June 1956.

Q. Did you have to receive any formal assignment at Chanute Field before coming back to Baltimore? A. With the Air National Guard?

Q. Yes, sir. A. I was informed when I departed that upon successful completion of the school I would be employed with the Air National Guard as an air technician.

Q. Who informed you as to that, Captain? A. Major Scott.

Q. Well, was he at Chanute Field when he informed you as to that? A. This was in Baltimore prior to my
42 departure for Chanute Field.

Q. Oh, I see. Well, then, you received no formal orders at Chanute Field upon completing the program? A. You mean assigning me to the Air National Guard?

Q. Yes. A. The orders, I believe, were that upon completion the pilot at that time upon orders will be returned to the home station.

Q. Did you get a diploma or certificate upon completing that course? A. I did.

Q. And do you have that also? A. Yes, I do.

Q. Would you likewise turn that over to Mr. Mudd, if you please? A. I will.

Q. Then upon completing the course you came back to Baltimore? A. That is correct.

Q. And did you immediately start full time in
43 Baltimore? A. I did.

Q. And exactly what was your title at that time and what were your duties? A. Again I am not exactly sure of the exact title as air technician. I believe it was Base Maintenance Supervisor.

Q. Where? At what place? A. At Friendship Airport, with headquarters at Harbor Field.

Q. Who were your superiors? A. I believe that Colonel Warfield was Squadron Commander of the 104th Fighter Squadron until the end of that year.

Q. And this was 1955? A. 1956.

Q. 1956. And exactly what was your title? A. Again, as I say, I don't recall the exact title. I believe it was Base Maintenance Supervisor.

Q. Do you mean by written orders? Were you given written orders? A. I assume I was. There are
44 orders employing me, or there were at that time orders. I assume I was given a copy. I don't recall.

Q. Were there other persons in the particular job you had or were you the sole person with the assignment that you have described? A. I was the sole person in the 104th Fighter Squadron.

Q. As of that time, what property was under your control in that capacity? A. I had control over three T33-type aircraft. I am not quite clear on that, whether it was two or three—this is some years ago—and I believe about eighteen F86E-type aircraft, and which was, of course, I think, about twenty-three or twenty-eight, the F86E-type aircraft conventional.

Q. Anything else? A. And a C47-type aircraft.

Q. Anything else? A. I believe that is all.

Q. Where were these planes kept at that time? A. The F86 aircraft were at Friendship Airport and the C47 was at Harbor Field.

45 Q. In whose hangar? A. The hangar, I believe, was owned by the City of Baltimore, with certain spaces leased through another agent to the Air National Guard.

Q. Who was the other agent? A. I think it was Pan American Airways.

Q. Did you ever see a copy of the lease? A. No, sir.

Q. Do you know if this was a formal written lease or oral lease? A. I have no knowledge of it as to the terms.

Q. This is Friendship? A. Yes.

Q. Was that likewise true of Harbor Field? A. I am not aware of the arrangements there.

Q. Who owned these planes? A. The United States Air Force owned the equipment.

Q. And do you know the circumstances under which they were in possession of the Air National Guard? A. As far as I know, the aircraft are assigned to the National Guard Bureau and distributed by the Bureau to the
46 individual units, and the units are charged with the responsibility for the maintenance of them.

Q. What is the full name of that Bureau? A. The National Guard Bureau.

Q. The National Guard of what? Is that the full title? A. As far as I know, it is the full title.

Mr. Wolcott: Would you get the headquarters address, please?

Mr. Galiher: Yes.

The Witness: It is in the Pentagon in Washington.

Q. (By Mr. Galiher) Now, were you required to send certain reports on the equipment and to turn certain reports on equipment over to any persons or agencies? A. Yes, sir.

Q. To whom, may I ask? A. There are reports that are submitted to various agencies.

Q. Please list them. A. I don't know if I can recall them all. There is the 1-10 report, Air Force, and it is
47 either on DD Form 1-10, or on Air Force Form 1-10.

Q. And what is the DD Air Force 1-10 or Air Force 1-10? A. It is a record of the status of utilization of the aircraft for a calendar month.

Q. Who prepares that form, and who made this, first? A. They are prepared in the maintenance officer's office, and a copy is sent to the National Guard Bureau and a copy to the Air Materiel Command.

Q. May I ask you, where is the maintenance officer's office?

Mr. Mudd: When, Mr. Galiher?

The Witness: Well——

Mr. Galiher: I thought we were talking about 1956. And if there is any difference, of course, between now and then, I would be very happy to determine it. But this question I am asking, if you wish to draw any distinction between a practice at that time, a practice in 1958 and practice in 1959, please do so.

Mr. Mudd: Well, I am not concerned about the practice, but you are asking the witness to give you the
48 physical location of the office.

Mr. Galiher: Yes. And this question, of course, had to do with 1956.

Mr. Mudd: All right.

The Witness: At this time the office was located in a hangar at Friendship Airport.

Q. (By Mr. Galiher) Now, you have told us that one copy went to the National Guard Headquarters. A. Yes, the National Guard Air Bureau.

Q. Where was the National Air Guard Bureau? A. The National Guard Bureau?

Q. The National Guard Bureau. A. Yes.

Q. Where was that located? A. At the Pentagon.

Q. And I think you started to mention a third place, is that right? A. The Air Materiel gets a copy.

Q. Yes. Where is that located? A. I believe this copy goes to the McClellan Air Force Base.

49 Q. And McClellan Field is located where? And what is the full title of the Materiel Air Command? A. McClellan Air Force Base is located in Sacramento, California, and the title is Air Materiel Command.

Q. Of what organization? A. It is a Division, a Subdivision of the United States Air Force.

Q. Yes, sir.

Now, have you given us the full title of the office at the Pentagon that you mentioned? If not, will you please do so? A. It goes to the Chief of the National Guard Bureau, but it is directed to the Air Division of the Maintenance Section.

Q. Of the U. S. Air Force? A. Of the National Guard Bureau.

Q. Well, is the National Guard Bureau a separate unit at the Pentagon or is it a part of the U. S. Air Force? A. I am not completely familiar with their relations.

As I understand it, the Bureau is a division of it, but I am not sure what the relation is.

50 Q. Have you ever visited that Bureau yourself? A. Yes, I have.

Q. And under what circumstances and when? A. I don't recall exactly when, but I have been there on several occasions to discuss maintenance problems with the Maintenance Division of the Maryland National Guard Bureau.

Q. Before the accident that we are going to inquire into here today? A. Yes, that is correct.

Q. And do you recall what the precise problems were about that took you there? A. I do not.

Q. Do you have a record of those anywhere or could there be a record at your headquarters? A. Not necessarily, no.

Q. You cannot give us any idea as to what the maintenance problems were that took you to Washington, or, rather, I should say to the Pentagon Building in Virginia? A. Not precisely, no.

Q. Well, could you give us even the faintest idea?

51 A. None, none whatsoever.

Q. But you believe you may have been there several times? A. Yes.

Q. What about the command in Sacramento, did you ever go there? A. Never have, no, sir.

Q. I believe you told us you sent these reports on maintenance to these three places you mentioned today. A. Yes. There are, I believe, two other copies that I am not quite sure at the present time where they go. One copy is retained locally.

Q. You mean by locally out at Martin Field? A. Right.

Q. Or at Friendship, as it was then? A. Friendship in that case, and eventually it may have gotten to our headquarters location at Harbor Field.

Q. Would there have been a copy sent to any other agency? A. One copy, I believe, goes to the Tinker Air Force Base at Oklahoma City.

52 Q. What is the base there? A. It is an Air Materiel Command Base.

Q. Of the U. S. Air Force? A. Of the United States Air Force. This copy goes to that function at the base. There may be other activities on the base.

Q. Do those reports deal with conditions of different planes of the U. S. Air Force at Friendship?

Mr. Pettibone: I object to the form of the question.

Q. (By Mr. Galiher) Now, please answer. A. No, they belong to the utilization and the operation status of the aircraft, but not to particular conditions at any given time.

Q. You mean what they have been used for during the intervening month? A. They indicate utilization in the form of flying hours as opposed to hours possessed for the month.

Q. By hours possessed, you mean taking a 24-hour day, having the plane on the day the plane was utilized? A. That is correct.

53 Q. Is that right? A. Yes.

Q. Now, who utilized those planes at that time, and if there is any difference now, of course I would be interested in hearing that. A. Basically, it is the pilots assigned, or attached to the 104th Fighter Squadron in this case.

Q. Did any U. S. Air Force pilots ever use them? A. Yes, sir.

Q. Under what circumstances would they use them? A. The air advisor that is attached has a responsibility to maintain certain efficiency standards.

Q. Who was the air advisor for the U. S. Air Force who was attached to the Friendship Field, or who was attached to Friendship and thereafter at the other field? A. It was the 104th Fighter Squadron. Aattached to the 104th Fighter Squadron.

Q. What necessarily are his duties or were his duties at Friendship Field, and who was it at that time in 1956? A. He was Lieutenant Colonel Robert Dow. And I could not tell you exactly what his duties are. He is at-
54 tached as an advisor or learner with the United States Air Force.

Q. Do you know his present address? A. Colonel Dow, I believe presently is in Germany with the United States Air Force.

Q. I see. Did he occupy the same office that the National Guard offices occupied at Friendship Field? A. His office was located at Harbor Field.

Q. Pardon me? A. In the National Guard facility there.

Q. This was at a time when you were at Friendship Field, is that right? A. Yes, that is correct.

Q. You say he was there in an advisory capacity and as a liaison officer, is that correct, liaison with the Air Corps?

Mr. Davidson: What is the answer?

A. Yes.

Q. (By Mr. Galiher) What exactly did his duties consist of as you understood them? A. As I understand
55 them, the air advisor is assigned to help with the standardizations between other units, other like units, and between the now Continental Air Command, which is our parent trained Air Force.

Q. Now, when you say standardization of other units, I assume that you mean that he was to make sure that all units operated in the same way, I take it. Is that what you mean by standardization? A. Well, that all units operate and to satisfy the criteria established by the Air Force.

Q. And the other units which you were using together with your own unit were what units? A. We had a senior air advisor that was attached to the 113th Fighter Wing, and within the Wing.

Q. May I ask you where that Wing was located? A. That is located at Andrews Air Force Base.

Q. And was that also a National Guard Unit? A. That is correct.

And within the Wing there were, at that time, three squadrons, and I think each squadron had an advisor.

Q. And Andrews Air Force Base is the United States Air Force Base a short distance outside of Washington, which you have reference to? A. That is correct.

Q. Now, did you take your orders at any time from Colonel Dow? A. As a superior officer in a military status, I was obligated to take orders from Colonel Dow.

Q. And from time to time did he give certain necessary orders which you complied with? A. Possibly.

Q. Well, what was the relationship, if any, between—was it Major Scott who was your superior officer as far as the National Guard was concerned, or was it Colonel—you gave me the names of Warfield and Dow—Colonel Warfield? A. At that time and until the end of 1956, at that time Colonel Warfield was the Squadron Commander of the 104th Fighter Squadron of the Maryland Air National Guard.

Q. He was Colonel Dow's superior officer at the base? A. He was the senior officer, yes.

Q. And would Colonel Warfield take orders from him under certain circumstances and conditions just like you would? A. I assume he would. He had a rank obligation.

Q. Did you have any flying operations at that time? This is 1956. A. I was a rated pilot, and as a pilot I had efficiency standards to maintain, minimum flying qualifications to maintain, yes.

Q. And did you comply with and satisfy those requirements? A. I did.

Q. Were you required to file reports as to your flying time? A. Yes, sir.

Q. Did you receive any additional pay for flying? A. Yes.

Q. At that time? A. As a rated pilot, there is an additional pay.

Q. What was the additional pay and who provided it? A. The Treasury of the United States provided the pay,

the checks were made on the Treasury of the United States, and the additional pay was a prorated portion of the flying pay.

58 Q. Did you at that time still maintain your Reserve commission? A. I had an Air National Guard commission.

Q. From the United States Air Force? A. It is Federally recognized by the United States Air Force.

Q. Now, was this additional pay for flying paid as a result of that commission or was it paid as a result of the job classification that you had at the field? A. It was paid as a result of the commission and rating as a pilot.

Q. Well, the end rating as a pilot, you mean that was a part of your Air Force Reserve commission, or was it a part of your job classification at the base?

Mr. Pettibone: I object to the form of that question.

A. I received flying pay as a result of my being commissioned and federally recognized as on a flying status and having accomplished certain flight time from the United States Government, and not as an air technician.

59 Q. Was there any requirement as to certain flying time, and if so, who laid down the particular requirement? A. This is as a result of my commission or as an air technician?

Q. Well, if it encompasses both, I would like to hear it. A. As a result of my commission, in order to maintain the rating as a pilot, I was required to satisfy certain criteria established by the Air Force in the form of flying.

Q. By the United States Air Force? A. Yes.

Q. And you did all your flying in the U. S. Air Force planes at the base? A. Well, this question cannot be answered that simply. When you say all my flying at that base, I flew the Air Course assigned to this squadron at Friendship Airport, yes.

Q. All of which was titled in the name of the United States Air Force? A. It was my understanding that the aircraft are the property of the United States Air Force, assigned to the Maryland National Guard.

60 Q. And to whom did you turn in your statements showing flying time? A. My statements, personal statements, were filed in the operations section of the 104th Fighter Squadron, and the disposition of the forms from that point, I am not aware of that.

Q. Now, you told us that you would get extra pay from the Federal Government for flying, am I correct? A. I got extra pay as opposed to a non-rated or non-flying person with the same rank, yes.

Q. Well, these reports would ultimately have to get back to the U. S. Air Force to show how much flying time there was in order to have the amount of money due to the assignment you would get?

Mr. Pettibone: I object to the form of the question.

A. I cannot answer that question. I assume they would have. I don't know the method or disposition of the forms.

Q. (By Mr. Galiher) You have no idea then where you sent the reports? A. I did not send the reports.

61 Q. What did you do? A. My reports, as I say, were filed in the operations section with the 104th Fighter Squadron.

Q. Q. At the field? A. At the field, yes.

Q. At that time Friendship Field? A. Harbor Field.

Q. And what you are telling us is that you don't know whether they went there or not? A. That is right.

Q. Would they have gone to Major Scott or Colonel Warfield? A. I cannot answer your question.

Q. Now, then, did your status as you have explained it existed in 1956 in any way change, and if so, when?

Mr. Mudd: Up to what date? You mean to the present time?

Mr. Galiher: If there was a change, I am now asking when it first changed.

A. You mean——

Excuse me, Mr. Mudd.

Mr. Mudd: Do you want it from then to the present time, Mr. Galiher?

62 Mr. Galiher: I am only asking now when the first change in status occurred. And I will try to take it from there.

Mr. Mudd: Go ahead.

A. You are referring to my military status as air advisor officer?

Q. (By Mr. Galiher) Any status. You are explaining what your status was in '56 when you came back to Friendship from Chanute Field, what your duties were and what you did, and now I am asking when did any change occur in your status, in your duties, and when was that. A. I had a duties change in the air technician job, I believe in May of 1958.

Q. And that was the subject of written orders? A. There were orders, yes, indicating that.

Mr. Wolcott: What is the date on that? Get the date of it, if you will.

Q. (By Mr. Galiher) When was that? A. I believe that was in early '58.

Q. Was this before the accident occurred? A. Yes.

63 Q. Who did those orders come from? A. The decision for the orders I believe was made by the Base Detachment Commander.

Q. Who was at that time—— A. Lieutenant Colonel Kilkowski.

Q. What was the nature of the change in status? A. We were authorized and acquired another full-time technician who took over the duties of Base Maintenance Supervisor.

Q. Were those duties formerly occupied by you? A. That is correct.

Q. All right. A. And I took over the duties of Aircraft Maintenance Chief.

Q. And what was the difference in the dates, and where? A. Basically, Major Mitchell, and he occupies other positions, but he was Maintenance Supervisor.

Q. What is his name, please, and his present address? A. Jesse D. Mitchell, Major.

Q. He is still a major? A. He is with the 104th Fighter Squadron.

64 Q. Thank you. A. He took over the over-all supervision of the base, aircraft, vehicles, and related equipment, and under the job description I am confined to the aircraft maintenance area only.

Q. What duties then did you give up? A. The vehicle maintenance, the building maintenance, the crash rescue equipment maintenance, and so forth.

Q. What additional duties did you take on? A. I don't believe I acquired any additional duties. Q. What duties did you continue to have? A. The responsibility for aircraft maintenance, maintenance of the aircraft.

Q. What exactly did that consist of? A. Supervision and control of the maintenance procedures and the protection of the property.

Q. The what of the property? The protection? A. Yes.

Q. The protection of it. I see. I am trying to get the word that you used there. A. Let me retract the

65 word, if I may, and say I was responsible to see that the property was not abused by maintenance personnel.

Q. Now, again are you referring to the planes of the United States Air Force? A. The aircraft.

Q. Of the United States Air Force which was at the base? A. That is right.

Q. What station were you assigned to? A. Let me correct that. Those planes are assigned to the Maryland National Guard, and as I understand it they are the property of the United States Air Force.

Q. What base were you at at that time? A. Martin Airport.

Q. When had you left Friendship and gone to Martin? A. In the summer of 1957.

Q. And did you take with you the same planes that you had then at Friendship Field? A. We did.

Q. And is it a fact that in the intervening years between

1956 and 1958 some planes were taken back by the
66 Air Force and some additional planes were sent to replace the planes that had been taken back? A. We received additional aircraft in that period and we had converted——

You said 1958?

Q. I said from the time you went back in '56 up to and including this period you are now talking about. A. In mid-1957?

Q. Yes. A. I don't recall their having transferred any aircraft back to the Air Base.

Q. Between '57 and '58? A. Well, between '57 and '58 we had changed aircraft types, at which time we received from the Air Force, from the Air Force Reserve facilities, different type aircraft.

Q. By the way, who made the necessary repairs on this aircraft from the time that you went back to the base and up to and including 1958? A. I am not aware of the budget system. We requisitioned and received aircraft spares through this Air Force installation.

67 Q. You mean U. S. Air Force installation? A. U. S. Air Force installations.

Q. In other words, whenever you needed a new part to repair a wornout or damaged part on one of those planes, it was furnished by the U. S. Air Force? A. Yes.

Q. Upon a written request? A. We received the equipment from a United States Air Force facility generally.

Q. Would you have to go through the liaison officer assigned to your particular field—— A. No, sir.

Q. —to get those parts? A. No, sir.

Q. What system did you have for securing them? A. There are established supply channels where the maintenance people can requisition aircraft spares or other spares that—I am not totally familiar with all the budget problems or the proper writing of the requisition.

Q. Did you get some of them, for example, from
68 Andrews Field? A. Andrews would not normally be a source.

Q. What would be the normal sources? A. There are certain United States Air Force Bases that are established as bases for supplies, or depots that would normally stock those parts or repair parts for distribution.

Q. Pardon me? A. For distribution.

Q. And what would be the normal source for this area? A. This would vary with the type of equipment.

Q. Well, can you describe the several sources for this area, then? A. The general airplane type of spares for this type aircraft repairs would probably come from Sacramento, from McClellan Air Force Base.

Q. All right. A. And the engine spares would probably come from the Tinker Air Force Base.

Q. Where is Tinker? A. In Oklahoma City.

69 Q. I see. A. And the instruments for the airplane would probably come from Mobile, Alabama, from Brookley Air Force Base.

Q. These are all U. S. Air Force Bases? A. They are United States Air Force Bases.

Q. And from time to time between 1956 and 1958, parts were secured from one or all of these bases? A. Yes.

Q. Now, then, did you have any serious damage to any of the planes during this period 1956 up to and prior to the time of the accident in 1958, when it was necessary to actually send the plane to one of these places or to some other U. S. Air Force Base for repairs? A. I don't recall having to send an airplane to an Air Force Base. If we had an aircraft damaged, we had to get disposition of the aircraft from the United States Air Force.

Q. Tell us about that, please. A. We had one aircraft that was damaged, and it was considered more economical to repair that by AMC—Air Materiel Command—and we were instructed to remove certain parts from the

70 aircraft for recovery and transporting the carcass to Middleton Air Force Base, or the Olmstead Air Force Base at Middleton Air Base.

Q. That is the United States Air Force Base? A. Exactly.

Q. Did the Materiel Command actually send someone to—would it be Friendship or Martin—to examine this plane? A. No, they did not.

Q. How was that handled? A. The examination was made by myself, with the assistance of some specialists, and the report of damage was submitted through the proper channels to the AMC, and from this report they determined the aircraft was beyond economic repair.

Mr. Mudd: By AMC, you mean Air Materiel Command?

The Witness: Air Materiel Command.

Q. (By Mr. Galiher) Now, then, I started to ask you about your new assignment. Was that when you were elevated to captain? A. No, sir.

71 Q. When were you elevated to captain? A. In July, July 1st of 1956.

Q. And that was upon your return from Chanute Field? A. That was after my return from Chanute Field.

Q. Now, in 1956 and '57, after leaving Chanute Field, did you have any training program which you pursued thereafter at any U. S. Air Force Bases? A. No, sir.

Q. You did not take any training program in 1957? A. In the United States Air Force? In any United States Air Force Flying Base?

Q. Yes. A. No, sir.

Q. Well, apparently you are qualified. Did you take any training anywhere, and if so, where? A. We had our normal two weeks summer training with the Air National Guard.

Q. And when was that? A. At Savannah, 1956, and in 1957.

Q. Did you do any flying down there? A. Yes, I did.

Q. And at what base was this in Savannah, Geor-

72 gia? A. Travis Field.

Q. Is that a U. S. Air Force Base? A. I don't think it is.

Q. Do you know who operates it? A. I believe the City of Savannah operates it.

Q. Well, was there any program there sponsored by the U. S. Air Force at that time? A. Again, we had to satisfy certain training criteria established by the Air Force.

Q. That was similar to the other programs that you have previously spoken of here? A. That is correct.

Q. Now, you told us about your change in status in 1958. At that time were you drawing the two types of pay checks in payment for your services? A. I was.

Q. And had you drawn the two different pay checks ever since? A. I had.

(Short recess then taken.)

Q. (By Mr. Galiher) Captain, what was the name
73 of the senior advisor that you mentioned was the Wing Commander at Andrews Field? A. Colonel Stone.

Q. Do you recall his first name? A. James, I believe.

Q. Now, a few minutes ago you were talking about how damage was repaired, and where, to the planes. Where would you send the damaged parts, for example, the instruments that would be replaced by new instruments? A. There are instructions in Air Force regulations, or technical orders, that direct you to send them either to a repair facility of the Air Force, or locally repair or dispose of them. It varies with the particular case.

Q. When you say the Air Force, do you mean the U. S. Air Force? A. The United States Air Force.

Q. And do you use forms for the purpose? A. Yes, sir.

Q. And where do those forms come from that you use? From the United States Air Force? A. They would
74 either come from the Department of Defense or the United States Air Force.

Q. Now, I think I was asking you about your status, your change in duties, which you described, early in 1958, and you mentioned some of your duties. Did you describe any of your duties in your other capacity? I don't believe you did. A. There was no change in my flying status at all.

Q. To make sure, if you don't mind, would you mind repeating again exactly what your duties were that remained with that change in status? A. I had the same responsibility for satisfying Air Force criteria, the United States Air Force criteria, and minimum flying I always had. There is no change in that particular area.

Q. Now, in your flying capacity, what duties did you have? A. I was an instructor pilot in the T33 and F86-type aircraft, and a flight check pilot in both types of aircraft, and instrument instructor pilot in the T33 aircraft.

Q. In the hearing before the CAB on page 136, you answered as follows:

75 "In the flying capacity, I am an instrument flight examiner in the T33 and instructor pilot in the T33, instructor pilot in the F86, and as I stated before, the aircraft maintenance officer for the unit."

Is that a complete description of what your duties were at that time with the change of assignment? A. The description is accurate, yes.

Q. Captain McCoy, some time ago interrogatories were served on the United States of America, and one of the questions provided as follows:

"At the time of the occurrences out of which this action arises and during May 1958 state each of the other branches of the United States Government, the Maryland Air National Guard, or any other branch of any other government that Captain Julius R. McCoy was connected with in any way, giving his rank, official position or positions, his titles, his serial number and his official status with any such governmental agencies."

To that question the United States of America

76 answered as follows:

"Upon information and belief, Julius R. McCoy was, at the time of the accident, employed by the State of Maryland as a technician with the Maryland Air National Guard, his position being that of aircraft maintenance chief. Prior to May 16, 1958, he was employed as a tech-

nician, his position being that of base maintenance supervisor. In addition, McCoy was a member of the Maryland Air National Guard, holding the rank of captain therein, serial number AO784050. He also held an assignment of captain in the Air National Guard of the United States, serial number AO784050."

Now, does that accurately state your status at the time of this unfortunate accident?

Mr. Mudd: Excuse me just a minute.

(Discussion off the record.)

Mr. Mudd: For the record, let me enter an objection, inasmuch as the question calls for and the answer attempts to give what seemed to be conclusions of law. However, I will permit the witness to answer insofar as he
77 is able to.

Mr. Davidson: Can we hold that for a moment?

Q. (By Mr. Galiher) Well, suppose I ask you this, Captain McCoy, in view of the objection.

You have filed an answer in the actions instituted against you in the United States District Court for the District of Maryland, have you not, through your attorney, Mr. Mudd?

Mr. Mudd: That is correct.

Q. (By Mr. Galiher) And in your answer you have admitted that at the time of the occurrence, at the time of the accident, you were the agent, servant and employee of the United States of America, and that the jet aircraft involved was owned, controlled and operated thereby.

That is a fact, is it not?

Mr. Mudd: Again—and put this in the record—I think you are asking the witness non-factual questions, Mr. Galiher, and which in a sense are conclusions of law, which necessarily have to be based on facts.

That is the proper admission and answer filed to the pleadings.

78 Mr. Galiher: I have read it accurately, have I, Mr. Mudd?

Mr. Mudd: As far as I know. I have not checked it.

Mr. Galiher: I wonder if you would mind verifying that.

Mr. Mudd: Certainly. I presume it is accurate.

(Paper handed to Mr. Mudd.)

Mr. Pettibone: I would like to enter an objection to the form of the question also.

Mr. Mudd: As far as I can tell, the answer is properly read.

Mr. Wolcott: Could the witness identify that, please.

Mr. Galiher: Let the record show that there was exhibited to Mr. Mudd, counsel for Captain McCoy, a copy of the answer of Julius R. McCoy which was filed in answer to the case of the State of Maryland, for the use of Mary Jane Meyer, etc., vs. The United States of America and Julius R. McCoy, No. 11360.

Mr. Mudd: That is correct.

79 Mr. Wolcott: Could that be marked for identification, please.

Mr. Galiher: Mr. Reporter, would you mark this Plaintiff Capital Air Lines No. 1, for identification only.

(Answer marked Plaintiff Capital Air Lines No. 1 for identification.)

Mr. Galiher: Now, I don't believe we have ever obtained a formal answer to the question with respect to the interrogatory.

Q. (By Mr. Galiher) May I hand this interrogatory to you again, so that you will have it in front of you (handing paper to witness).

May I call your attention to the second interrogatory, which starts, "Prior to May 16, 1958," etc., and would you look at that, if you please and the balance of the paragraph, the balance of the answer. A. (Examined by witness.)

Q. Would that be a fair analysis of your job or jobs requirement or requirements?

Mr. Pettibone: I will enter an objection to the form of the question.

Mr. Wolcott: Pardon me, what question was that?

80 Mr. Galiher: Number 11, beginning with the word "prior."

Mr. Wolcott: All right.

Mr. Mudd: I will accept the question as modified to mean job classification. I don't think the answer describes the job. It merely refers to its title.

Mr. Galiher: That is right.

Mr. Mudd: Now, can you answer, Captain McCoy, if that describes your job classification?

The Witness: Yes, basically. There is one omission I think in that sentence, that is included in the first sentence, and that is a technician with the Maryland Air National Guard, and in the second sentence it does not include that.

Mr. Galiher: All right, sir.

Q. (By Mr. Galiher) Now, then, that was at the time of and prior to May 20th, 1958? A. That reference there is to the part of May 16th? Is that it?

Q. This is the situation, that instead of at the time of the accident and prior thereto in the answer, when

81 you indicated your change in status earlier that month—— A. Ask me the question again.

Q. From the change in status, from the time of the change in status up to and including the time of the accident, the portion of the answer which I have just called to your attention, plus the one addition which you have made, would be a fair explanation of your jobs, your job classifications?

Mr. Mudd: With that modification, I accept the question. This is off the record.

(Discussion off the record.)

The Witness: Would you ask me the question once more, please, if I may have it?

Q. (By Mr. Galiher) With the one addition made by your counsel, does the language commencing with the word "prior" in the answer to interrogatory number 11, as read

to you, and change May 16th to May 20th, constitute a fair resume of your job classifications on and prior to May 20th, 1958? A. The status change occurred on May
82 16th, and so this prior to May 16th is not the status that I had.

Mr. Mudd: No, the question was, the answer given has been changed to read "prior to May 20th."

Mr. Davidson: On and prior to May 20th.

Mr. Mudd: On and prior to May 20th.

The Witness: I was not base maintenance supervisor on May 20th. I was base maintenance supervisor prior to May 16th.

Mr. Mudd: All right.

Q. (By Mr. Galiher) In other words, you were no longer base maintenance supervisor but were aircraft maintenance chief? A. That is correct.

Q. Now, what were you required to do to maintain this assignment as captain in the Air National Guard of the United States? A. I was required to attain the prescribed training, or the training assemblies, and to perform the duties of an aircraft maintenance officer in accordance with directives issued by the United States Air Force.

Q. What were the training assemblies that you
83 were required to attend? A. These are scheduled training periods, of which there are normally twenty-four per year, and two weeks summer encampment.

Q. Where were they held and under what sponsorship? A. They were held at the 104th Fighter Squadron facility. In the case of the Friendship location, it would be at the Friendship Airport, and after moving to the Martin Airport, they would be at the Martin Airport, and the summer encampments were held at some other base.

Q. And who would conduct the training assemblies? A. The training program is established by the United States Air Force, conducted internally.

Q. And how were they also put on the program? A. The actual training was conducted internally within the unit.

Q. By whom? A. By the people in the 104th Fighter Squadron.

Q. And who were the people in the 104th Fighter Squadron who conducted them? A. The members of the
84 unit themselves, the various supervisors within the unit.

Q. Can you name any of them? A. It might have been anyone. The members of the unit have to be specialists in a particular field.

Q. You might have conducted some of them, and did conduct some of them? A. That is correct.

Q. Did you have any U. S. Air Force men assigned to conduct any phase of them? A. Not especially.

Q. Was any record of the assembly transmitted to any particular location after its completion? A. I assume so. I did not have that responsibility personally.

Q. Would it be fair to say that that was transmitted to the United States Air Force?

Mr. Pettibone: I object to the form of the question.

A. Again, I don't know the routing.

Q. (By Mr. Galiher) Did Colonel Dow participate
85 in any of these training assemblies? A. Did he participate in the training assemblies?

Q. Yes. A. Yes, sir.

Q. I do not mean to lead you into error by the word "participate." If you have some other expression, tell us about it. A. He participated in the training assemblies, yes.

(Discussion off the record.)

Q. (By Mr. Galiher) What about these summer encampments? Are these the same ones you have previously referred to? A. I don't recall the last date we referred to.

Mr. Davidson: 1957.

A. We had a summer encampment in 1958 and a summer encampment in 1959.

Q. (By Mr. Galiher) Before the accident in '58? A. No, sir.

Q. Well, I think you told us about the one—was it not in Savannah, in '57? A. Yes, sir.

Q. That is the one you have reference to, Travis
86 Field? A. We had an encampment in 1957 in Savannah, yes, at Travis Field.

Q. Now, then, what else were you required to do to maintain your assignment as captain in the Air National Guard of the United States in addition to the training assemblies and in addition to the two weeks active duty? A. I was required again to fulfill the responsibilities of an aircraft maintenance officer during the training assemblies and in the summer encampment.

Q. And how could you satisfy the United States, how did you satisfy the United States that you had done just that? A. Well, I could only say I assume they were satisfied. I discharged those responsibilities of this duty to the satisfaction of the United States Air Force.

Q. Well, what I am trying to find out is how you established that you had done so and how you knew that you had satisfied the U. S. Air Force. A. Well, I fulfilled the duties as outlined by the regulations, the Air Force regulations and manuals and technical orders.

87 Q. Can you identify these particular regulations, manuals and technical orders? A. They are numerous, sir. There are great quantities of them.

Q. Well, can you list some of them, and can you supply your attorney with the additional ones, so that the reporter might have a complete answer to this question, please?

In other words, you need not complete your answer to that question today, but I would like a complete answer on that.

Mr. Mudd: Captain McCoy will give you as complete an answer as he can today.

Mr. Galiher: Yes, sir.

Mr. Mudd: That is all he can say.

Q. (By Mr. Galiher) Can yo uanswer that, Captain? A. The question is, will I supply this——

Mr. Mudd: No.

Q. (By Mr. Galiher) No, the question is how much of that question can you answer today? Can you give us some of these that you made reference to? A. The only answer I can give you is that I discharged
88 the duties of an aircraft maintenance officer as outlined in the job description and the appropriate publications.

Q. The job description as handed out by the U. S. Air Force? A. In the appropriate Air Force manual, yes, sir.

Q. Now, all of these manuals that you talk about and these regulations were supplied to you by the U. S. Air Force? A. They were requisitioned and received from the Air Force facility, yes, sir.

Q. What about flying? What was the flying requirement? A. Could you be more specific?

Q. What flying were you required to do by the U. S. Air Force to maintain your commission as a captain? A. The minimum requirements are outlined in Air Force Regulation 60-2, I believe, which establish the minimum with respect to various types of flying, such as night flying, instrument flying, total flight hours, and so forth.

Q. And was the purpose of that, as explained to you by the U. S. Air Force, to increase your proficiency?
89 A. These flights are designed to increase and maintain a standard of proficiency, yes, sir.

Q. And did you always comply with the requirements from the time that you obtained your commission as captain? A. I satisfied the requirements every year on it.

Q. And exactly what were the requirements as to flight time from '56 up to and including the time of the accident? A. The minimum requirements—again this varies with the phases of the various types of flight that have to be accomplished by Air Force Regulation 60-2, which might change at any given time, or might have changed during that period, could supply that answer better than I could.

Q. Were you told that by increasing your proficiency as

a pilot your opportunity to advance would just be increased?

Mr. Pettibone: I object to the form of that question.

A. I don't recall a specific point being made of that, no.

Q. (By Mr. Galiher): Well, were you encouraged
90 by the U. S. Air Force in these training assemblies, or the active duty assignments in each year, to fly more and more to increase your proficiency?

Mr. Pettibone: I object to the form of the question.

A. I think it is a natural assumption that by practice, by producing skill, that proficiency would be increased. However, there are limitations.

Q. (By Mr. Galiher): It is also a fact that it was necessary to put in a certain amount of flight time in order to maintain your own status and thus make yourself eligible for other assignments too, was that not a factor?

Mr. Pettibone: I object to the form of that question.

A. Would you restate the question, please?

Q. (By Mr. Galiher): In addition to proficiency, is it not a fact that it was also necessary to put in a required amount of time required by the Air Force in order that you might maintain your status and make yourself eligible for additional assignments?

Mr. Pettibone: Same objection.

91 A. As the total flying hours are increased, the total accumulated flying hours are increased, your pilot rating is more advanced.

Q. (By Mr. Galiher): Your p[illegible] rating in the Air Corps? A. As recognition by the United States Air Force is advanced, thereby your responsibilities grow.

Q. And did you wish that to happen as the years went on? A. Yes.

Q. Did your pay increase between 1956 and 1958? A. Military pay?

Q. One and both. A. I don't recall the specific dates of a pay increase within that period, no. That is the best way to answer it.

Q. Did your rating with the U. S. Air Corps, the Air Force, go up in that period? A. As a pilot?

Q. Yes, sir. A. I was given additional responsibility as a pilot. However, I have never had a rating in-

92 crease, because this is based basically on a division of hours and flying time. I did not achieve the flying hours in that period to have that pilot rating increased.

Q. But what increase in pay did you derive by virtue of the other phases that you mention? A. I don't recall an increase in pay, as I stated before. It is very possible that I may have had an increase in pay due to longevity in the service, but not because of more accumulation of flying hours.

Q. Did you have to pass any test to maintain your position in the National Air Corps of the United States? A. Pilots are required to complete annual examinations both in flying and with equipment.

Q. What about a physical examination? A. And a physical examination.

Q. And did you pass these examinations that you have referred to? A. I did.

Q. Each year? A. Yes.

Q. What sort of a test were you given on your

93 flying period, and by whom? A. I was given an instrument examination each year and a standardization, flying standardization examination each year, and I could not recall at the present time the particular pilot that supervised those tests.

Q. Was that given you by a U. S. Air Force pilot? A. On one occasion I was qualified in aircraft, or in airman's language, checked out in an aircraft by a United States Air Force pilot, yes, sir.

Q. When was that? A. That was in, I believe, 1955.

Q. The type of aircraft, please, you were checked out in? A. F-86-E Series Aircraft.

Q. And you have already described that type of plane in the record? A. Yes.

Q. What about the other test? Was that a written test that you were given each year? A. A written examination, yes, sir.

94 Q. And was that given by the U. S. Air Force? A. One of those tests is a specified United States Air Force examination, yes, sir.

Q. And each year that was taken by you where? A. At the home station location.

Q. And sent to the Pentagon? A. I have no idea where the distribution was.

Q. Now, you told us about being checked out by an Air Force pilot in 1955. Did you have any check-outs in '56, in '57, or in '58? A. Yes. Let me see. I had additional checks in 1955 at Chanute Air Force Base by Air Force pilots.

Q. Was that to comply with these requirements that you previously alluded to? A. In one case, yes.

Q. And what year was that? A. 1955.

Q. What was the purpose of having check-outs? A. Well, let us say the requirements that I have alluded to previously. I have made no mention of check-outs prior to this.

95 Q. Well, I thought you mentioned there were two types of examination, and I thought the examination as to flying you had referred to as check-outs. If I am in error, please clarify it. A. One was a standardization, one was an annual standardization check, and the other was an annual instrument check.

Q. Well, the instrument check was not in a plane? A. It is in a plane, yes.

Q. And is that by the Air Force? A. It was on one occasion, yes, in 1955 I had an instrument check by a United States Air Force pilot, yes.

Q. Did you have any instrument check-outs by an Air Force pilot in '55? A. In 1954—that date may be wrong—I believe in 1954 I attended an Air Force School at Craig Air Force Base, Selma, Alabama, for the purpose of instru-

ment training, and check-out transition training in T-33 type aircraft.

Q. Did you have such checks in 1956 or '57 or '58? A. Your question is still by an Air Force pilot, is that correct?

96 Q. Yes, sir. A. I cannot recall any specific check by an Air Force pilot in that period.

Q. Did you have any check by anyone during that period? A. Yes, sir.

Q. By whom? A. By someone, either an Air Force pilot or a member of the 104th Fighter Squadron. As I say, I cannot recall if there was an Air Force pilot that administered the check.

Q. Do you have any record, or can you lead us to any sort of check? A. Yes, I believe that can be established.

Q. How? A. By records in my possession.

Q. Now, as of 1958, what flying time had you had in different kinds of planes, up to the time of the accident? Could you list them? A. As of the time of the accident, I believe my total flying time was something more than 1900 hours. I believe they were approximately 600 hours in jet type aircraft, and about 300 in T-33 and 300 in the F-86.

97 Q. Were you qualified in jet-type aircraft, and if so, when? A. I was initially qualified in jet-type aircraft, in T-33 aircraft, in 1954.

Excuse me, just a moment. Off the record.

(Discussion off the record.)

The Witness (continuing): My statement is right, sir. Now, my statement is correct so far as it is.

(Testimony read by the reporter.)

The Witness (continuing): And I was further qualified in F-86 type aircraft in 1955.

Q. (By Mr. Galiher): Have you enumerated your various qualifications and could you give us some idea as to

the time in each type of aircraft? A. I believe I just gave that.

Q. Excuse me. A. They are fragments, I might add.

Q. Now, May 20th of 1958, you were an officer in the United States Air Force Reserve, were you not? A. On May 20th of 1958, I was an officer in the Air National Guard of Maryland and the United States, to the best of my belief.

98 Q. As of May 1958, what sort of benefits were you receiving apart from the monies from the two sources that you have previously referred to? In other words, what pension or pensions were available to you at that time, what sick leave benefits were available to you at that time, what hospitalization benefits and the like? A. I was accruing retirement points in my capacity as in the military status for the scheduled training assemblies and the summer encampments, and other active duty for training tests that I might participate in.

Q. Was this in the United States Air Force that you are talking about? A. This is in the Air National Guard of the United States.

Q. Yes, sir. A. Or attending Air Force Schools, United States Air Force Schools for training.

Q. And upon retirement who would that pension be paid by? A. I assume the Federal Government.

99 Q. Yes, sir. Would you please continue? A. Insofar as sick leave in the military status, I don't know the policy, if there is such a thing, but it is my understanding that in the event of injury in line of duty, it is investigated to determine if it is first in line of duty, a line-of-duty-type of injury, and benefits are received from a military hospital, or a designated hospital by the military. This is in the Air National Guard military status.

Q. Had you prior to this accident ever been in any U. S. hospitals for sickness or injuries received in line of duty? A. Not since probably 1943.

Q. As a result of the accident which occurred on May 20th, 1958, did you go to a military hospital? A. I was

first admitted to the Frederick Memorial Hospital and transferred to the United States Public Health Service Hospital in Baltimore.

Q. I would like to pursue that a little bit further, if I might, to include a complete answer to my question as the various benefits that you were eligible to receive,
100 and I don't believe you completed that.

Were there any additional benefits that you were entitled to receive by virtue of your job status? A. As air technician, I was eligible for benefits under the Federal Employees Compensation Act.

Q. And what else were you entitled to? A. I was entitled to certain sick leave benefits that are accrued at some rate, but I am not really sure of that.

Q. From whom? A. From I assume the same source that I was employed by.

Q. Well, everything you have listed so far has been from the United States of America.

Were there any benefits that you were entitled to in the way of pension, sick or injury benefits, retirement, which the State of Maryland was required or had agreed to pay you? A. I hink we have a legatl point in that. I would not make a statement on it.

Q. Well, I am asking you now, and we might as
101 well resolve this, and tell us as far as you know.

Mr. Mudd: To your knowledge.

A. To my knowledge, the State of Maryland was not obligated.

Q. (By Mr. Galiher): Now, as a result of this accident, you had started to tell us that you were in a Government hospital. For how long a period of time were you there?

Mr. Pettibone: I object to the form of the question.

Q. (By Mr. Galiher): What hospital were you in, to make sure of the record. A. I was in the United States Public Health Service Hospital.

Q. Whereabouts? A. In Baltimore.

Q. And how long were you in that hospital? A. I was

confined to the hospital for approximately two weeks, and I received payment at the hospital for some three weeks after that, I believe.

Q. And did you pay the bill for that treatment?

102 A. I did not.

Q. And do you know who paid the bill for that treatment? A. I assume that the Federal Employees Compensation Act paid the bill.

Q. Do you recall making out any forms in connection with that? A. I answered or completed a form there, I believe to the Department of Labor, to the effect that they would not assume financial responsibility unless I completed this particular form.

Q. How did you happen to get that form? A. It came in the mail.

Q. Was this after you had gone back on active duty? A. This is after I had gotten out of the hospital, yes, sir.

Q. And were back on active duty?

Mr. Pettibone: I object to the form of the question.

A. Well, what is your definition there of active duty? Would you define active duty?

103 Q. (By Mr. Galiher): Well, I will take your definition. A. This is probably after I had returned to my job at Martin Airport. I am not sure that I had gone back to the job fully at that time or not.

Q. How long had you been out, Captain? A. When I got the form or when I went back?

Q. First of all, how long were you away after the accident before returning to Martin? A. Approximately four weeks.

Q. And this according to your best recollection is some time after you returned to work? A. I say now this might have been before I returned or it might have been after I returned. It was in that period somewhere.

Q. Did you keep a copy of this form that you made out or any of the correspondence? A. I may have a copy. I am not sure.

Q. Would you, if your please, search for it, and if you have it, turn it over to your counsel. A. I will.

104 Q. So that he in turn might let us see it. A. I will.

Mr. Galiher: May I ask you also at this time, Mr. Mudd, if you please—the Labor Department has declined to permit us to view the record of this case without a written authorization from Captain McCoy, and even if that is secured, they have not indicated to us whether they would permit us to see it, because of a communication from the Department of Justice.

Would you secure for us an appropriate authorization from Captain McCoy, so that at least we can comply with their tentative request?

Mr. Mudd: I will consider any authorization that is forwarded to us for signature.

Mr. Galiher: Well, as I understand, they have no formal authorization, and I think they will——

Off the record.

(Discussion off the record.)

Mr. Galiher: I would leave it in that posture. And we can follow it up if necessary.

(Thereupon a recess was taken.)

105 AFTER RECESS

Q. (By Mr. Galiher): Captain McCoy, I think when we adjourned for lunch I was inquiring about Workmen's Compensation benefits. You told us you were out of work for a certain period of time. During that period of time did you receive your full pay? A. I did.

Q. From both sources? I should say both job classifications. A. Well, the air technician pay continued. The military pay would be discontinued if you missed a training assembly, or at least a portion of it would be discontinued. I don't recall if there was a training period within that period. I am sure there was. I don't recall if I missed

one within that time or not. But any training assembly that is missed is not made up, so that a portion of your pay would be deducted, it would be absent.

Q. As far as you know, was any part of your pay deducted? A. I don't recall.

Q. Now, all of your hospital and medical expenses
106 were paid for? A. Yes, sir.

Q. By the Federal Government? A. Someone. The FEC, I believe.

Q. Colonel Kilkowski filed a request on your behalf for your treatment under the United States Employment Compensation Act, did he not? A. That is the normal procedure. I assume he did.

Q. You say that is the normal procedure? A. Because of an injury, the procedure is for the contractor or some designated supervisor to file a CA form of some number requesting treatment; in case there is some indecision as to the validity for the requirement of treatment, another form would be filed. But in either case the hospital is provided with a form requesting treatment by some designated person.

Q. In other words, what occurred in your case had occurred previously in other cases? A. With regard to the form, yes.

Q. And were you familiar with the forms which had been used in other cases? A. I am familiar with the forms.

107 Q. Had you actually yourself prepared such a form for any other injured person? A. I have.

Q. And do you recall specifically who these other cases involved? A. Not specifically. On an occasion or two there have been some minor injuries on the job that required treatment.

Q. Were these pilots? A. No.

Q. What was the job classification involved? A. Air craft mechanics generally, people that worked directly for me.

Q. And this same form was used that had been used

in your case? A. As far as I know. If I could see the form, I could more accurately answer your question.

Mr. Galiher: Well, suppose I have this marked for identification, Plaintiff Capital Air Lines No. 2 for identification, please

Mr. Wolcott: Are you marking the whole group
108 of papers?

Mr. Galiher: We might as well have the whole group marked.

Mr. Wolcott: Perhaps they ought to be clipped together.

Mr. Galiher: All right.

(Group of papers referred to marked Plaintiff Capital Air Lines Exhibit No. 2 for identification.)

Mr. Wolcott: I wonder if a statement could be made regarding the production of those papers.

Mr. Galiher: I am going to do that right now.

Mr. Wolcott: All right.

Mr. Galiher: This Plaintiff Capital Air Lines Exhibit No. 2 consists of a group of photostatic copies of records from the United States Employees Compensation Commission which were turned over to me for use in this interrogation by Mr. Theodore Wolcott during the luncheon recess, and were according to Mr. Wolcott obtained by him pursuant to application and court order in the proceedings which he has filed.

Mr. Wolcott: No court order, but application and
109 agreement of counsel.

Mr. Galiher: Application and agreement of counsel in the action which he has instituted in the State of New York.

Mr. Wolcott: The Morgan case.

Mr. Galiher: In the Morgan case.

Mr. Pettibone: May I see them, please?

(Papers handed to Mr. Pettibone.)

Mr. Galiher: On yesterday, I think you said.

Mr. Wolcott: Yes, they were furnished to me by Mr. James Fitzsimmons, Assistant United States Attorney, in charge of the procurement division for the Eastern District of New York.

Q. (By Mr. Galiher): The form I have referred to was the one which bears Colonel Kilkowski's typewritten name and I believe his signature on the original.

(Papers handed to Mr. Mudd and then handed to the witness.)

Q. (Continuing): Is this the form that you are familiar with and that was used in your particular case? A. Yes.

110 Q. This is the one that had been used in one or two other cases involving injuries at the base? A. Yes.

Mr. Wolcott: Have you identified that particular form by number on file?

Mr. Galiher: The form I have shown is captioned Request For Treatment Of Injury Under The United States Employees Compensation Act, and then there follows, "Employees of the United States are entitled to medical, surgical and hospital treatment under the provisions of the Compensation Act only for injuries sustained in the performance of duty." And it is dated May 27th, 1958 and bears the signature of Victor F. Kilkowski, Lieutenant-Colonel, Maryland—well, I will read it, "Md. NGAF, Base Detachment Commander."

Q. (By Mr. Galiher): In connection with your injuries and your treatment, you were treated by a physician at the U. S. Public Health Hospital by the name of Doctor—is that Winslaff? A. Doctor Winslaff.

111 Q. Who was George J. Winodich? A. Windich?

Q. Windich. A. He is the administrative assistant, or at that time was administrative assistant to Colonel Kilkowski.

Q. And because of burns on your hands. And did you authorize him on May 29th, 1958 to sign any other form which contains the caption, "Employees Notice of Injury or Occupational Disease, Federal Employees Compensation Act"?

(Paper handed to witness.)

A. That is correct.

Q. The injuries which are covered in this file that has been exhibited to you, or portions of which have been exhibited to you, are injuries received in their entirety as a result of the collision which we are inquiring into here today, Captain McCoy?

Mr. Pettibone: I object to the form of the question.

A. I have not seen the file in its entirety. I don't know all that is in there.

(Papers handed to witness.)

(Papers examined by witness.)

112 Mr. Mudd: You can answer the question now.

A. As far as I could determine, there is nothing in there that was not—no injuries noted that were not a result of the accident.

Q. (By Mr. Galiher): And did you receive certain benefits as a result of this claim?

Mr. Pettibone: I object to the form of the question.

A. I was given medical care, medical attention and hospitalization, at no expense to myself.

Q. (By Mr. Galiher): And so far as your know, you lost no pay? A. As far as I know now, I lost no pay.

Q. And did you also execute an agreement under the terms and conditions of which you in consideration of the payments made to you by the United States under the Federal Employees Compensation Act, sold, assigned, transferred and set over to the United States of America all your right, title and interest in and to any claim which you might have for damages against Capital Air Lines

and against any other parties other than the United
113 States who might be legally liable for such injury, together with all rights of action thereunder on October 3rd, 1958? A. I saw that. That is the form that you referred to earlier in the deposition, and which I said I might be able to locate. Do you still require that?

Q. No, sir. A. I did sign it. I executed it.

Q. That is what you had reference to earlier in the deposition? A. That is correct.

Mr. Mudd: May I ask, Mr. Galiher, if at some convenient time I could be furnished copies of these documents which we do not have?

Mr. Galiher: Yes. As a matter of fact, I am going to make copies of this. I will make a copy for Mr. Mudd if that is all right with you, Mr. Wolcott.

Mr. Wolcott: Yes, no objection.

Q. (By Mr. Galiher): Now, has any branch of the United States of America gotten in touch with you concerning the filing of a claim against Capital Air Lines? A. None.

114 Let me retract that. Has any branch approached me——

Q. Yes, sir. A. —if that is what you have in mind?

Q. Yes, sir.

Mr. Mudd: Off the record.

(Discussion off the record.)

Q. (By Mr. Galiher): Now, coming down to the day of this particular unfortunate accident, what was your assignment and tour of duty? A. This was a non-military day. I was in an air technician's status when I reported at the normal work hour of eight o'clock, and my assignment for that particular day was as aircraft maintenance chief, as an air technician.

Q. At Martin Field? A. That is right.

Q. And what time of the day did you take off on this flight? A. 1107.

Q. What time had you commenced work? A. At eight o'clock.

115 Q. What had you done from eight until eleven? A. I had performed the duties of aircraft maintenance chief.

Q. Which on that day consisted of what? A. I don't recall the specific functions. The overall supervision of the maintenance program for the day and other related projects.

Q. Had you had any plan for this flight prior to this day? A. Yes.

Q. When had the plan been formulated or made for this particular flight? A. The initial planning stages were on the preceding Saturday.

Q. What had taken place at that time and who was involved? A. Why, I believe on that Saturday I approached Colonel Kilkowski with the possibility of taking that flight on that Tuesday, and also with the possibility of the passenger being allowed to accompany me.

116 Q. Well, apparently you had met this passenger prior to that time. A. Yes. I had known him for approximately three years, I believe.

Q. When had you discussed with him his taking a flight? A. Well, in the preceding period of time I discussed it more than once.

Q. What was this man's name and what was he doing? A. His name is Chalmers. What do you mean, what was he doing?

Q. Did you discuss the proposed flight with him? Was he in the Air Force? Was he in the National Guard? Was he a civilian? Just what was his status? A. He was in the Maryland National Guard, the ground division, in the Air National Guard, the Maryland National Guard, the ground branch. And he had known me for about three years in that field and in that branch. I had known his father, and I had known the fellow myself over this period of time, but not through the National Guard necessarily.

Q. Were you trying to interest him in being a full-time employee of the Air Force? A. No.

117 Q. Well, how did the discussion of flying come about with him? A. He was interested in aircraft. I had invited him to the field on numerous occasions, or on some occasions, to look at the aircraft and——

Q. Had he indicated any interest in the Air National Guard? A. Through me, he had, or because of me he had.

Q. In what degree and in what respect? A. Well, I can't answer for the degree. He was interested.

Q. In other words, you were interested in getting him to join—— A. Yes.

Q. —the Air National Guard? A. Yes.

Q. Up to that point he was in the Maryland National Guard? A. That is right.

Q. And had he expressed an interest in flying? A. He had.

118 Q. Did he have any flying background that you know of as a pilot? A. None.

Q. Did you arrange a tentative flight with him on Tuesday the Saturday before? A. Yes.

Q. As a result of a conference you had with Colonel Kilkowski? A. That is right.

Q. And what conversation did you have with him concerning this young man and concerning the flight on Tuesday, as far as you can recall? A. I specified to Colonel Kilkowski that all the requirements or regulations would be satisfied, and that he could comply with all the requirements as they existed at that time, and he approved the flight.

Q. Did you tell him that there was any other reason for the flight? A. Well, I had made at that time numerous flights for one purpose or another, for flight checking purposes, for efficiency of flying.

119 Q. For flight check purposes, that is to check the equipment that was under your control? A. That is correct.

Q. The material that was under your control? A. That is correct.

Q. And that was one of the things that you were required to maintain and keep a careful check on? A. I was required to maintain and keep a careful check on the equipment, and by flying it I had a better opportunity to check the quality control of the product we were maintaining.

Q. And on this particular flight you were doing it for that purpose as well as the purpose of maintaining proficiency?

Mr. Mudd: Excuse me.

Doing it for that purpose. What purpose?

Mr. Galiher: The purpose he has just mentioned in the prior question.

Mr. Pettibone: I object to the form of the question. I don't think it is clear to anybody.

Mr. Mudd: No. The last purpose he mentioned
120 I think was maintaining efficiency.

Mr. Galiher: Well, I will ask it that way.

Would you read back his last answer?

(Answer read by the reporter.)

Q. (By Mr. Galiher): And also, by the same token, to increase your own proficiency at the same time as a pilot? A. That is correct.

Q. And that was the purpose of the particular flight at the time of this unfortunate accident? A. I made numerous flights with the idea in mind to increase my proficiency and to analyze the quality of the product. This particular flight——

Q. You include that? A. This particular flight was a part of my function to maintain proficiency and maintain the equipment.

Q. Thank you.

Now, then, what formal details were carried out on this morning prior to eleven o'clock by you in consummating or formalizing arrangements? A. This is with regard to the flight itself?

121 Q. Yes, sir. A. Again, I contacted Colonel Kilkowski and satisfied him once more that the flight could be made within the regulations, that there was no violation, and he once more agreed to the flight. Since there would have been a passenger this approval is always provided. The preparations for the flight themselves were made by myself, with the assistance of some personal equipment personnel who aided me in the briefing and the preparation of the passenger.

Q. And do you recall who that was? A. Who the people were?

Q. Yes, sir. A. It was Sergeant Buttion—B-u-t-t-i-o-n.

Q. And his first name, please, if you have it. A. Lester.

Q. Is he with the Air Corps? A. He is with the Air National Guard.

Q. Yes, sir. A. An air technician.

Q. Yes, sir. A. Sergeant Perticone—P-e-r-t-i-c-o-n-e.

122 Q. His first name, please. A. What is his name?

Mr. Mudd: If you don't know, say you don't know.

The Witness: I don't know.

Q. (By Mr. Galiher): Likewise the Air National Guard? A. Yes.

Q. Did you file a flight plan? A. I did.

Q. Who did you file that with? A. I filed Air Force No. 113 Local Flight Plan in the Operations Office of the 104th Fighter Squadron. It is a DD form.

Q. Who approved that? A. I approved it.

Q. You had authority to approve that without going to anyone else? A. That is correct.

Q. Now, is that flight plan still in existence, and if so, where is it? A. I don't know where it is. I assume that the flight plan or a reproduction thereof is still in

123 existence somewhere.

Q. Did you have to do anything else before take-off? A. I obtained the appropriate weather brief from the weather terminal at Friendship Airport. I got necessary clearance from the tower for taxi and take-off.

Q. Are you talking about the Friendship tower, or do you have a tower at Martin? A. The Martin tower.

Q. Who operates that tower? A. I believe the Martin Company operates it.

Q. And do you know who employs the operators therein? A. I believe that the Martin Company employs them.

Q. Yes, sir.

Now, then, did you have radio communication with the tower prior to take-off? A. I did.

Q. Did you have radio communication with any other place prior to take-off? A. I did not.

Q. Now, this plane you were in was a United
124 States Air Force plane? A. This aircraft was assigned to the 104th Fighter Squadron by the National Guard Bureau, and I understand it is the property of the United States Air Force.

Q. Can you tell us what markings were on the plane? A. The identification on the aircraft?

Q. Yes. A. I believe it was AFNG. I am not really sure of this fact. It may be either Md. ANG, or AFNG. And Md. ANG stands for the Maryland Air National Guard and AFNG stands for Air Force National Guard.

Q. You mean by that you had some markings of one description on some planes and some other markings on others? A. This is very possible, but at the time there was a transition from one type of markings to another.

Q. But in any event, regardless of the markings, the plane was a U. S. Air Force plane?

Mr. Pettibone: I object to the form of the question.

A. It is my understanding it is the property of the United States Air Force, yes.

125 Q. (By Mr. Galiher): What was the transition you are speaking of? A. This is a change in the lettering on the side of the aircraft from MdANG to AFNG.

Q. In other words, the Air Force was required, whenever it was that they did it, that the planes be lettered

with AFNG on them instead of MdANG? A. As far as I know, it was required by the National Guard Bureau.

Q. Do you recall when that came about? A. I do not.

Q. Were you in uniform on that day? A. I was in uniform and a flying suit when I was in the aircraft.

Q. Similar to the type of uniform that you have on? A. It would probably be the khaki, a khaki uniform, summer khaki uniform.

Q. And that was the type uniform you had worn for a number of years? A. That is correct.

126 Q. Similar to that of the U. S. Air Force? A. That is correct.

Q. And was the flight suit that you wore the same type of flight suit required by the United States Air Force? A. That is correct.

Q. Did anything else occur prior to the take-off?

Mr. Mudd: Objection. I don't think the witness can answer that unless you would amplify it a little bit.

Mr. Galiher: I mean of a significant nature.

He told us he filed his flight plan, and he told us he was cleared by the Martin tower.

Q. (By Mr. Galiher): Did anything else take place prior to take-off? A. At this moment I can't think of anything significant.

Q. What was the condition of the weather? A. The weather was given to me by the Friendship weather facility as being, I believe, 5500 feet overcast, but broken, with ten miles visibility, rapidly improving.

* * * * * * * * * *

129 Q. (By Mr. Galiher): Did you plan this flight in accordance with Air Force regulations? A. Air Force and Local regulations.

Q. And did you file the flight plan on the Air Force form? A. It is a Department of Defense form.

Q. A Department of Defense flight plan? A. That is right, clearance, flight clearance.

* * * * * * * * * *

134 Q. (By Mr. Galiher): Yes, I want to ask him if he would interpret that for us, first, if he was familiar with it, and secondly, if he would interpret it.

• • • • • • • • • • •

135 Q. (By Mr. Galiher): I asked you if you could explain and/or interpret that document to us. A. I have seen similar documents. I don't believe I have seen this one before. But this is a standard message form, TW4 form. And it is from headquarters, ANG, at Wright Field Air Force Base, Ohio, and it is to various people, which you can identify here, directing the transfer of in a particular case T-33, 53, 59, 66, to the 104th Fighter Bomber Squadron, and which gives instructions for delivery to Friendship Airport.

Q. Is that the plane which you took off in? A. That is correct.

Mr. Galiher: Would you mark that Plaintiff's Capital No. 4 for identification, if you please, Mr. Reporter?

(Flight plan referred to marked Plaintiff Capital Air Lines Exhibit No. 4 for identification.)

• • • • • • • • • • •

136 A. This is the—excuse me—I said this is Air Force Form 113, and this is the local flight clearance.

Q. Is that one of the documents that you filed prior to take-off? A. That is correct.

Mr. Galiher: No. 5, if you please, for identification.

(Weight and balance clearance form referred to marked Plaintiff Capital Air Lines Exhibit No. 5 for identification.)

Q. (By Mr. Galiher): Please examine that, Captain (handing paper to witness).

(Paper examined by witness.)

Q. (By Mr. Galiher): Is that a part of the documents that were filed when you filed the flight plan?

137 A. This form is on file.

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142 Q. (By Mr. Galiher): Will you examine document No. 6 and tell us as far as you can recall if this is the course your flight followed from the start to the accident?

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144 The Witness: It is the approximate course, but I have no idea whether it is to scale or anything else.

Q. (By Mr. Galiher): All right, thank you.

Now, then, as you have indicated, you first went over Chesapeake Bay. Did there come a time thereafter when you flew over Friendship International Airport? A. I say that approximates it. We did not pass directly over Friendship Airport.

Q. Do you recall what your altitude was at that time?

Mr. Mudd: At which time?

Mr. Galiher: When he passed over or in the vicinity of Friendship Airport.

Mr. Mudd: Please specify that. He just said he did not pass over Friendship.

Q. Mr. Galiher: Or in the vicinity of it.

A. As near as I can recall, it was about 3000 feet at that point.

Q. (By Mr. Galiher): Was it to your right or to your left as you went over it? A. It was to my right.

Q. Did you have two-way radio communication in

145 your plane? A. We did.

Q. And did you talk with your passenger from time to time? A. Yes.

Q. Do you recall up to that phase of your trip any particular conversation that passed between you, any particular objects or landmarks that you had noted? A. I don't

recall at this time any particulars at any particular time along the route.

Q. Did you check with the Friendship tower when you went in that vicinity? A. I did not.

Q. Was there any reason why you did not check with the tower there? A. There was no reason why I had to check. There is no requirement, in other words.

Q. Did you at any time on this flight use any frequency for reception other than 236.6? A. I did not.

Q. Did anyone on any occasion during this flight
146 ever transmit to you on this frequency? A. Only at take-off.

Q. In other words, from take-off to the accident you neither received any radio transmission nor sent one? A. I did not say that. I said nobody transmitted to me to my knowledge. I received, I was maintaining a listening watch.

Q. All right. A. But there were no transmissions directed to me to my knowledge.

Q. All right, what do you recall receiving? A. I don't remember.

Q. Do you know if there is a record of those receptions? A. I don't know. I don't have any idea.

Q. Do you know who you were receiving from? A. I do not.

Q. Would it have been from any place other than Martin?

* * * * * * * * * *

A. I haven't any idea. There were no transmis-
147 sions directed to me to my knowledge. I have no idea of any other transmissions, or the origin of any other transmissions.

Q. (By Mr. Galiher): Well, did you distinguish between transmissions directed to you and what you received on that channel? A. I did not receive any transmissions directed at me from the time I departed Martin Airport until, or at any other time throughout the flight.

Q. Well, did you hear any communications over your radio at any time on that flight, not necessarily to you, but to either military or commercial planes? A. I heard transmissions, yes.

Q. Transmissions from whom, do you recall? A. I don't know.

• • • • • • • • • • •

Q. (By Mr. Galiher): Could you distinguish between whether they were entirely military or some military and some commercial? A. I have no idea.

Q. Is there any communication in existence which
148 would require your recollection as to that, that you know of? A. Not to my knowledge.

Q. After Friendship, where did you fly to? A. On a generally westerly heading to the vicinity of Leesburg, Virginia.

Q. What was your altitude from Friendship to Leesburg? A. At one point it was as high as 9000, never higher than 9000 feet, and there were various altitudes, and when I say "various," climbing to 9000, for instance.

Q. Did you fly on an airway from Friendship to Leesburg? A. Very possibly.

Q. You don't know exactly? A. I did not follow any airway in particular.

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151 Q. This flight from start to finish was made in conformance with United States Air Force Regulations?
152 A. That is right.

Q. You were required, of course, to conform to those U. S. Air Force Regulations? A. That is correct.

Q. In flying this plane? A. That is right.

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154 Q. Do you know if you were on an airway at the time of the accident? A. I don't know.

Q. Don't you know that you were on a commercial airway at the time the accident occurred? A. I am not aware

that there are commercial airways, so I am not familiar with it.

155 Q. Have you since learned specifically that you were on a Civil Aeronautics Airway, Victor 44, at the time of the accident? A. I believe that is correct.

166 Q. Now, then, do you ever receive any instructions from anyone as to flying on airways, commercial or otherwise? A. Could you restate that?

Q. With respect to looking out for other planes. A. Could you restate your question, to correct it to aeronautical airways?

Q. To Civil—— A. To Civil Aeronautics.

Q. I will do that. A. Military pilots are required to observe the Civil Aeronautics Regulations or new FFA Regulations, and observe the same traffic separation and operate in the same manner on an airway as anyone else, and were so instructed.

167 Q. You were familiar with that at the time of this occurrence? A. That is correct.

168 Q. (By Mr. Galiher): Who first interrogated you about this accident? A. I don't recall.

Q. Did there come a time when United States Air Force officers interrogated you about the accident? A. There was.

169 Q. And did they interrogate you before the Civil Aeronautics officers talked with you? A. Are you referring to the hearing itself or——

Q. Well, there was a United States Air Force hearing, was there not? A. There was.

Q. And there was a Civil Aeronautics Board hearing? A. There was.

Q. The United States Air Force hearing took place before the Civil Aeronautics Board hearing? A. That is correct.

Q. Now, I am talking about first of all the officers of the United States Air Force. Did they interrogate you prior to the hearing?

Mr. Mudd: Prior to the Air Force hearing?

Mr. Galiher: Yes.

A. Yes, they did.

Q. (By Mr. Galiher): And did you give a written statement to the Air Force? A. I believe I did, yes, sir.

• • • • • • • • • • •

178 Q. Could you describe the Air National Guard setup at Martin? That is, what have they got there? Hangars, or just how is it laid out? A. You mean the entire facility, the Air National Guard facility?

Q. Generally, just generally. A. Well, we have a hangar that houses most of our aircraft maintenance, and we have all of our maintenance and the operations section and the administrative section, and training. This is ground training, air crew training. And then we have two ware-
179 house locations and the transportation shop, and a crash station. And there is a fuel storage area, and ample parking facilities for our twenty-eight aircraft.

Q. Who do those buildings belong to? A. I believe they belong to the State of Maryland.

Q. I see. Are any of them on lease to Martin? A. None of those buildings are on lease to Martin.

Q. Was there a ground lease to Martin? A. I am not familiar with that.

Q. I see.

Now, are there any full-time officers of the National Guard, that is, staff officers, that are stationed at Martin? A. You mean as opposed to air technicians?

Q. Yes. A. Not Air National Guard, no.

Q. Was there a Colonel Maisch—M-a-i-s-c-h? A. Major M-a-i-s-c-h?

Q. Major Maisch. Is that M-a-i-s-c-h? A. Yes.

Colonel Kilkowski: Joseph.

180 Q. (By Mr. Wolcott) What is his rank and status? A. He is an air technician, and if I am correct his job title is Operations Supervisor, and he is the squadron operations officer in a military status.

Q. By whom is he employed? A. By the Air National Guard, in the air technician program.

Q. You are talking about the Air National Guard?

Mr. Pettibone: I object to the form of that question.

Q. (By Mr. Wolcott) Answer it, please. A. The manning of air technicians for that is provided by the Air National Bureau, and the manpower allocations are allocated to the states who then fill these positions locally. However, who employs him is a legal point.

Q. Just to clarify my thinking, could you tell me what the distinction is as between Air National Guard and the Maryland Air National Guard? A. The Air National Guard of the United States includes the various states. They are controlled and directed by the National Guard Bureau.

That is as I understand, I mean.

181 Q. I see. A. This direction goes to all the states.

Q. As far as you understand, that is the Federal Organization, the United States Air National Guard?

Mr. Davidson: The Air National Guard.

A. Of the United States.

Q. (By Mr. Wolcott) That is a Federal organization? A. The general group of the various states.

Q. In other words, it is a national organization that supervises the state organization, is that it? A. Its supervision and direction is initiated with the National Guard Bureau and disseminated to the various states. Now, whether they have an organization called that——

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198 Q. (By Mr. Wolcott) In the course of your training and experience, did you become familiar with the CAR, particularly referring to Part 60?

Mr. Pettibone: I object to the form of that question.

Q. (By Mr. Wolcott) Will you answer that, please? A. I believe that all of the CARs are included in Air Force Regulations 66-D as they apply.

Q. Yes. Now, what manuals were used by you in connection with the operation and maintenance of T-33 type aircraft? A. Operation Technical Order T-33-A-1, which is the operation manual, or aircraft operation manual technical order.

Q. Does that also include maintenance, or is that the general operation? A. No, maintenance; the general maintenance manual would be IT-33-A-2, and it shreds out for all types of maintenance.

. . . . . .

217 Q. Captain, who is the Air Force liaison officer
218 stationed at the base? A. Major Britton.

Q. Can you give me his full name? A. Milton D. Britton.

Q. Are there any other Air Force personnel stationed at the base? A. There are.

Q. Could you tell us who they are, please? A. I am not positive of the names.

Q. As best you can and also while you are at it just give us their function, please. A. I can't be positive. There is Sergeant Baldwin, Sergeant Storm, and one whose name escapes me at this moment.

Q. What are the functions of these sergeants? A. These people are to assist Major Britton in advisory services in the maintenance area, the administration area, and weather flight.

. . . . . .

219 Q. Is there a manual, or are there manuals used in connection with that function? A. We are governed by manuals and regulations that also govern Major Britton and assist him.

Q. Are these manuals Air Force manuals? A. They are.

Q. Issued by the United States Government? A. That's right.

220 Q. Can you recall any? A. Air Force Regulation 60-16 is the governing regulation and it is accompanied by manuals that are—manual the details.

223 Q. (By Mr. Wolcott) Did Major Britton have an office there at Martin? A. He did.

Q. How was that designated? A. The physical identification of the office I believe is Air Advisor's Office.

Q. And is there a United States Air Force plate, insignia, or sign there? A. Not to my knowledge. No.

Q. Is that located in proximity to other officer personnel at the Air Force Base? A. It is.

Q. How close is that? Is that part of the same building? A. It is the next office; adjoining offices.

224 Q. Next office to whom? A. To the squadron commander and the base detachment commander.

Q. Who is that? A. Squadron commander is Major John F. R. Scott, Jr.; and the base detachment commander is Lieutenant Colonel Victor Kilkowski.

Q. Who is here and has been here throughout this proceeding, is that correct? A. That is correct. Colonel Kilkowski has been——

Q. Pardon me. A. Colonel Kilkowski has been here. Major Scott hasn't.

Q. That's right. Thank you.

Now, did Major Britton ever accompany anyone on flights? A. He has.

Q. Is that part of his regular procedures? A. I believe that part of his duties are to assist with the standardization of training and performance of the air group personnel.

225 Q. Did Major Britton also inspect the aircraft from time to time? A. As part of a pilot's normal

duties he would inspect the aircraft for its fitness before flight.

Q. Now you are referring to the time that he would be piloting a plane? A. That's right.

Q. Now, apart from that, would he inspect the squadron? A. Well, his office from time to time inspects aircraft and training.

Q. Thank you for the suggestion, Captain. So when I refer to Major Britton I will include his office. That is, his staff; the sergeants, I think that you mentioned. A. That's correct.

Q. They assist him in performing that function.

Well, just what do the sergeants do? A. They assist Major Britton in the performance of his duties through inspections and observations of the activities of the squadron.

Q. Is Major Britton and his staff there full time? A.

Major Britton is regular Air Force, or he is full-
226 time Air Force.

Q. I see, and he is there all the time at Martin? A. He is there the normal workday, yes.

Q. And how many hours is that, and what are the times involved? A. That is five days a week, roughly eight hours a day.

Q. Is that weekdays? A. Tuesday through Saturday.

Q. Tuesday through Saturday. That also applies to the sergeants? A. That's correct.

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227 Q What are the points of contact you have in the course of your duties at the Martin Air Force Base with Major Britton or his staff? A. The inspections that——

Mr. Pettibone: One moment, please, before the witness answers. I will object to the form of the question.

Mr. Wolcott: All right. Please answer it.

The Witness: The inspections that Sergeant Baldwin would complete are generally forwarded to the commander,

Major Scott, with Major Britton's signature, and then they are forwarded to me for action to comply with the discrepancy, or so forth, at the Martin Airport.

248 Q. (By Mr. Wolcott) Now, Captain, what do you
249 understand local flying area to mean? A. The local flying area, as I understand it, is as dictated by the commander through the operations officer.

Q. And is that a particular area to which you are physically limited in the operation of your aircraft?

Mr. Mudd: Objection.

The Witness: Shall I answer?

Mr. Mudd: Sure. Go ahead.

Mr. Wolcott: Yes. Go ahead. Answer.

The Witness: The only local flight clearance, VFR local flight clearance, the S.O.P. confines the operating—the operation of the aircraft to the local flying area, yes, sir.

Q. (By Mr. Wolcott) Well, now, on May 20th, 1958, were you limited to this local flight area? A. I was limited by S.O.P. with the type clearance I had to local flight area.

Q. The local flight area that we have just discussed, is that right? A. As near as I can determine, yes, sir.

Q. Now, in the performance of your duties as maintenance officer what uniform did you wear, Captain?
250 A. The uniform that I have on right now.

Q. Are there any other uniforms that you wear at the base other than what you have on now? Any other types of uniforms? A. Only the summer version of the same type of uniform.

Q. I see, and this is the same as completely identified by you last week? A. That is correct.

Q. So that whether you are performing flying duties or maintenance duties, or caretaker duties, or inspection duties, you always wear this uniform or the summer version thereof, is that right? A. Normally in the operation of an aircraft, you would not wear this uniform. Otherwise, yes.

Q. Now, in the operation of an aircraft you are talking about flight now? A. That's right.

Q. What uniform do you wear? A. You would wear the flight equipment, flight gear.

251 Q. Which consists of what? A. Flying suit, flying boots, gloves, helmet, parachute.

Q. Is that worn over your uniform? A. Not normally.

Q. You take your uniform off and put that on? A. That's correct.

Q. Now, what insignia does this flying gear have or markings? A. It is identified as property of the United States Air Force.

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255 Q. Yes. Now, on this particular occasion who conducted the pre-flight inspection? A. Maintenance personnel.

Q. Who is that? A. I believe that was Sergeant Nolan.

Q. Is there a record or form made of this pre-flight—— A. There is.

Q. And what is the form called, or how would you identify it? A. This inspection is recorded in one section

256 of the, again 781 form.

Q. Is Sergeant Nolan in the employ of the United States? A. Sergeant Nolan works as an air technician with the Maryland Air National Guard.

Q. And so far as you know is he paid by the United States? A. As far as I know his pay check is drawn on the Treasurer of the United States.

Q. Is he a full-time employee? A. He is a full-time employee.

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VOLUME II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1964

No. 345

MARYLAND, FOR THE USE OF NADINE Y. LEVIN, SYDNEY L. JOHNS, ET AL., PETITIONERS,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 3, 1964

CERTIORARI GRANTED OCTOBER 19, 1964

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Captain Julius R. McCoy

was recalled as a witness and having previously been duly sworn was examined and testified as follows:

Examination by Mr. Pettibone:

Mr. Pettibone: Will the Reporter mark this as United States Exhibit for identification No. 1.

(General Orders referred to marked U. S. Exhibit No. 1 for identification.)

Mr. Pettibone: Please hand United States Exhibit for identification No. 1 to the witness.

328 (Paper handed to witness.)

Q. (By Mr. Pettibone) Captain McCoy, will you look at United States Exhibit for identification No. 1.

Were you commissioned as a second lieutenant in the Maryland Air National Guard on 31 January 1952, with rank from January 25, 1952, pursuant to General Orders No. 9, issued by the State of Maryland Military Department, Fifth Regiment Armory, Baltimore, dated 31 January '52? A. This appears to be a General Order issued by the State of Maryland, appointing me as a second lieutenant in the Maryland Air National Guard, yes, sir, on the dates indicated.

Q. And that appointment was pursuant to General Order No. 9, an abstract part of which appears in United States Exhibit No. 1 for identification, is that correct? A. That is correct.

Q. Now, were you on March 31, 1952, by General Order No. 24, issued by the State of Maryland Military Department, Fifth Regiment Armory, Baltimore, Maryland, given Federal recognition as a second lieutenant in the Maryland Air National Guard, with date of rank from 25

329 January 1952? A. Again, a portion of the exhibit appears to be a reproduction of a General Order appointing me as a second lieutenant, with Federal recognition in the Maryland Air National Guard.

Q. And does the extract from General Order No. 24, which is shown in United States Exhibit No. 1 for identification, appear to be an extract copy of the orders so extending Federal recognition?

Mr. Mudd: Excuse me, Mr. Pettibone, but I did not hear the first part of your question.

Would you read back the question, Mr. McDonald?

(Question read by the Reporter.)

Mr. Wolcott: Excuse me, Mr. Pettibone, am I to understand from your remarks that these are not complete copies of orders but merely extracts?

Mr. Pettibone: It is an extract of the part of the order which pertains to Second Lieutenant Julius R. McCoy.

Mr. Wolcott: Well, couldn't you, Mr. Pettibone, for my enlightenment, tell me just what has been left out of the Order?

Mr. Pettibone: Nothing that pertains to Captain
330 McCoy. Nothing that pertains to him. The orders that we have been speaking of list a number of individuals, but the other individuals, of course, are of no interest to us in this proceeding.

Mr. Wolcott: I see. Then, insofar as Captain McCoy is concerned, the order is complete.

Mr. Pettibone: That is correct. That is correct.

Mr. Wolcott: Thank you.

May I ask you this, Mr. Pettibone?

Should I find it necessary, would you have any objection to furnishing me with the complete order?

Mr. Pettibone: No, I would be happy to.

Mr. Wolcott: Thank you.

Mr. Pettibone: If you will give me a reasonable time to obtain it.

Mr. Wolcott: Certainly.

Mr. Pettibone: I think it is perhaps in the files of the State of Maryland and in the files of the United States Air Force, so unless we happen to have a full copy, I would have to request it from the State.

Mr. Wolcott: Yes.

331 Mr. Pettibone: I will be glad to get it for you.

Mr. Wolcott: Well, I suppose that applies to all orders that you refer to.

Mr. Pettibone: Yes, sir, that is true.

Mr. Wolcott: Thank you.

The Witness: The answer to your last question is it is correct.

Q. (By Mr. Pettibone) And were you by General Order No. 9, dated 31 January 1952, issued by order of the Governor, State of Maryland Military Department, Fifth Regiment Armory, Baltimore, Maryland, assigned to the 104th Fighter Squadron as a pilot? A. The extract named appears to be a reproduction of a General Order so appointing me.

Q. You are referring to the part of General Order No. 9 which appears in the United States Exhibit for identification No. 1, is that correct? A. That is correct.

Q. Were you subsequently promoted to the rank of First Lieutenant in the Maryland Air National Guard? A. That is correct.

332 Q. Do you remember the date when you were so promoted? A. I think it was in October 1952.

Q. Was that also pursuant to orders issued by the Governor of the State of Maryland, General Orders of the State of Maryland Military Department? A. I assume so.

Mr. Wolcott: We are going to object to that as to form. It calls for a conclusion, and the document speaks for itself.

Q. (By Mr. Pettibone) Now, were you subsequently after that promoted to the rank of Captain in the Maryland Air National Guard? A. That is correct.

Q. Do you remember the date when you were so promoted? A. 1 July 1956.

Q. By whose orders were you so appointed? A. United States Exhibit No. 1 contains an extract from a General Order No. 47, issued by the Military Department, State of

Maryland, that would indicate I was Federally recognized as a Captain on 1 July '56.

Mr. Wolcott: I move that the answer be stricken
333 as not responsive, as it referred to a document that the witness has not stated that he needed to refresh his recollection.

Q. (By Mr. Pettibone) After your promotion to the rank of Captain in the Maryland Air National Guard did you receive Federal recognition in that capacity? A. That is correct.

Q. Was that by General Order No. 7, dated 5 August '56, issued by the Military Department of the State of Maryland, Office of the Adjutant General, Fifth Regiment Armory, Baltimore, Maryland, an extract copy of which appears in United States Exhibit for identification No. 1.

Mr. Wolcott: Objection as to form, calling for a conclusion.

Mr. Mudd: What order was that?

Mr. Wolcott: And the document speaks for itself.

Mr. Pettibone: General Order 47, Roman Numeral III, the first one on this page.

Mr. Mudd: I thought you said 7.

Mr. Pettibone: 47.

The Witness: Again, U. S. Exhibit No. 1 contains
334 what appears to be a reproduction of a General Order granting me Federal recognition as of 1 July '56.

Q. (By Mr. Pettibone) Do you at the present time hold a commission as a Captain in the Air National Guard of the State of Maryland? A. That is correct.

Q. Did you hold such a commission as Captain in the Air National Guard of the State of Maryland at all times to May 20, 1958? A. That is correct.

Q. Do you hold any other commissions at the present time in the United States Air Force? A. I am not positive of the total procedure. This is very possible. I cannot be positive.

Q. Well, have you ever received any orders appointing

you as an officer in the United States Air Force as distinguished from the Air National Guard of the State of Maryland? A. To my knowledge, all of the orders that commission me in the Air National Guard include Federal recognition as part of the commission.

335 Q. Yes, but that is not my question. My question was this: Have you ever received any orders appointing you as a commissioned officer in the United States Air Force as distinguished from the Air National Guard of the State of Maryland? A. I can say this, that all of the orders to my knowledge include the symbol AF, which to the best of my ability would be to represent Air Force.

Q. Have you ever received any order appointing you as a commissioned officer of any grade, issued by any Headquarters other than the State of Maryland Military Department? A. Not to my knowledge.

Mr. Mudd: May I raise a point of inquiry, Mr. Pettibone? And possibly Captain McCoy may not understand the import of your question.

Are you referring, for instance, to wartime duty, where I believe the witness earlier described this service during the war.

Mr. Pettibone: Well, I am glad you raised the point.

336 Q. (By Mr. Pettibone) I mean, Captain McCoy, to confine the period of time involved in my question to let us say subsequent to January 25, 1952, at which time you were appointed a second lieutenant in the Maryland Air National Guard, as you have already stated, so that I am not referring to any time prior to that. A. I understand.

Q. As a matter of fact, then, prior to January 25, 1952 were you ever commissioned as an officer—let me change my wording there, so that you will understand my question better, perhaps.

Were any orders ever issued by any Headquarters other than the State of Maryland Military Department commis-

sioning you as an officer in the United States Air Force, or the Army Air Force, or the National Guard, either of the Army or the Air Force? A. I was commissioned in the Army Air Corps on 4 August 1944, and I believe in 1946 in the Army National Guard of West Virginia.

Q. And were you discharged from active duty under your Army commission in 1944 which you just referred to? A. I was separated from active service in late 1945.

337 Q. Was that by General Orders issued by some military headquarters? A. That is correct.

Q. Do you happen to remember which headquarters issued those orders? A. I assume the Army Air Corps.

Q. And after that you were commissioned again in the National Guard of the State of West Virginia? A. I was commissioned in the Officers Reserve Corps subsequent to my separation from service, active service, Army Air Corps, in, I believe December 1945, and then later commissioned in the Army Guard, Army National Guard of West Virginia.

Q. That is the National Guard of the State of West Virginia you are referring to? A. That is correct.

Q. In the Air National Guard? A. Army.

Q. Yes. Referring to your Reserve commission which you mentioned, which you obtained in 1945, was that? A. I believe December '45, yes, sir.

338 Q. Were you discharged from that or released from it at any time subsequent thereto? A. I am not sure of the proceedings. I was commissioned without break in service to the West Virginia National Guard.

Q. Well, did you receive any orders at any time from any Headquarters relating to your status with respect to this Reserve commission which you just described? A. I would assume so.

Q. Do you have any recollection of what those orders provided? A. I do not.

Mr. Wolcott: Don't you have the records there, Mr. Pettibone?

Mr. Pettibone: No, Mr. Wolcott. These are State records, not Federal records.

Mr. Wolcott: I see.

Mr. Pettibone: And that is why I don't have it.

Mr. Wolcott: I thought you might have the Federal records on his reserve status.

Mr. Pettibone: We may have.

339 Mr. Wolcott: All right.

Mr. Pettibone: I don't know. I really did not mean to go into this service here.

Mr. Wolcott: That is all right. I thought if you had the records of that, that would help to clarify it.

Mr. Pettibone: Let us pause momentarily for a conference?

Mr. Wolcott: Surely.

Mr. Pettibone: Off the record.

(Discussion off the record.)

Q. (By Mr. Pettibone) Now, you testified previously, I believe, Captain McCopy, that you attended certain training schools, both prior to your appointment as a second lieutenant in the Maryland Air National Guard, and also subsequent thereto, is that correct? A. That is correct.

Q. And particularly you mentioned that you spent several months pursuing courses of training at Chanute Air Force Base in Illinois, is that correct? A. That is correct.

Mr. Mudd: Mr. Pettibone, may I make another

340 point of inquiry regarding your Exhibit No. 1 for identification, sir.

Mr. Pettibone: Yes.

Mr. Mudd: On the bottom of the first page is the inscription, "SPECIAL HANDLING REQUIRED" IAW, paragraphs 49(a) and 52, AFR 62-14.

Mr. Pettibone: Well, that should have been crossed out, but inadvertently the photostat was made before it was crossed out.

May I request the Reporter to draw a line through that at the bottom of U. S. Exhibit No. 1?

Mr. Mudd: No, I would object to that, the point of my inquiry being, of course, that inasmuch as the apparent handling of this is in accordance with an Air Force regulation, that I would assume that any responsibility for the use of this in a public proceeding would be yours and not that of the witness.

Mr. Pettibone: That is correct. I will assume on behalf of the United States full responsibility for introducing this at this time. And no responsibility is chargeable to Captain McCoy on that account.

341 Mr. Mudd: I further note that the photostat indicates that this is a certified true copy, which was made by Captain Millard F. Hamblin, Jr., of the U. S. Air Force, who apparently at that time was Recorder of the Aircraft Accident Board.

Mr. Pettibone: Well, that is a capacity which gave him the legal power or authority under the applicable Air Force regulations to make certifications of this type.

It has nothing to do with his other duties as an Aircraft Accident Board Recorder. It just merely indicates the position he held, which under regulation gives him a certifying power.

Mr. Wolcott: Well, I join in the objection Mr. Mudd made for the record.

You have offered a certified copy, which I assume is a complete one. And if any explanations are to be offered, I understand you mean you have given them, but as far as making a physical mark on the exhibit, I would definitely object to it.

Mr. Pettibone: You mean you object to offering a certified copy?

342 Mr. Wolcott: No, I have no objection to it. I am talking about making any change in the exhibit.

Mr. Pettibone: Well, I do not propose to make any change in the exhibit in any way. No, I do not propose to

make any change in it. My remarks are merely directed to the words "SPECIAL HANDLING REQUIRED," and the other little notation right under it at the bottom of the page, but I do not propose to do more than comment on them. I do not mean to change it.

Mr. Wolcott: Well, I was going to make the suggestion, Mr. Pettibone, that if you wanted to make an explanation of that remark at the bottom, then your explanation would be made in the record, and I think that would clarify it.

Mr. Pettibone: All right.

Well, apparently the words "SPECIAL HANDLING REQUIRED" were put on there for some military reason, to comply with some Air Force regulation or military requirement, the nature of which is really unknown to me.

Mr. Wolcott: Yes.

Mr. Pettibone: I am sure it does not have any
343 relationship to our use of the document here for our purposes. Certainly there is nothing classified or confidential and that is not public information contained in the document. And so I am not just sure how it got there or why. I am sure it has nothing to do with our purposes here.

Mr. Wolcott: Well, we will assume that.

Mr. Pettibone: Yes.

Off the record, Mr. Reporter.

(Discussion off the record, after which testimony was read.)

Mr. Pettibone: All right, will the Reporter mark as United States Exhibit No. 2 for identification this document?

(Special Orders referred to marked U.S. Exhibit No. 2 for identification.)

Mr. Pettibone: Would you please hand U. S. Exhibit No. 2 to the witness?

(Paper handed to the witness.)

Q. (By Mr. Pettibone) Captain, will you examine U.S. Exhibit No. 2 for identification?

(Paper examined by witness.)

344 Q. Is United States Exhibit No. 2 for identification a copy of the orders which you received, which caused you to go to the Chanute Air Force Base, Illinois, to pursue a course of training and instruction which you described earlier in your testimony in this proceeding?

Mr. Mudd: If you remember.

Q. (By Mr. Pettibone) That is right, if you remember.

Mr. Mudd: I think you are testing the recollection of the witness.

Mr. Pettibone: Yes.

Q. (By Mr. Pettibone) I don't mean to call upon you to state more than you can remember, of course. A. U. S. Exhibit No. 2 appears to be a reproduction of Special Order No. 182, that authorized me to proceed to the Chanute Air Force Base for the reasons stated, yes.

Q. And did you pursuant to this Special Order No. 182, issued by the Military Department of the State of Maryland, proceed to Chanute Air Force Base, Illinois, on or about 18 September 1955?

Mr. Mudd: Objection. I object to the conclusion of counsel in the framing of the question.

345 Mr. Pettibone: What conclusion, may I ask, Mr. Mudd? I asked him if he proceeded pursuant to those orders.

Mr. Mudd: You said pursuant to the State of Maryland National Guard Bureau, and there are words there indicating it is by authority of the Secretary of the Air Force, in a communication from the Chief of the National Guard Bureau.

Mr. Pettibone: That is true, but at the top of the exhibit it states, "Military Department, State of Maryland, Office of the Adjutant General, Fifth Regiment Armory, Baltimore, Special Order No. 182" and then follows the text of the order which says, "By order of the Governor, Milton A. Reckord, Major General, the Adjutant General."

That is why I refer to it as an order of the Air National Guard of the State of Maryland.

Mr. Mudd: Well, I think it is obvious then, from the reading of the document, and even the prior Exhibit No. 1 for identification, that these orders have been cut from orders received from other authorities and issued to Captain McCoy.

346 Mr. Pettibone: Oh, I agree. I think the document will speak for itself in that respect. But I still feel my characterization as I framed it in my question is proper.

Mr. Wolcott: Well, I join in the objection that Mr. Mudd just noted. I think it is improper for you to make your own characterization of an order that speaks for itself.

Mr. Pettibone: All right, I will withdraw the question in that manner in which I framed it before, and I will put it to the witness in the following manner:

Q. (By Mr. Pettibone) Captain McCoy, did you pursuant to the orders contained in United States Exhibit No. 2 proceed, on or about September 18, 1955, to Chanute Air Force Base, Illinois? A. I did.

Q. And while at Chanute Air Force Base, Illinois, pursuant to these orders, did you pursue a course of training to students in maintenance, known as or described as aircraft maintenance officers course? A. I did.

Q. And on the completion of that course where
347 did you go? A. I returned to Baltimore.

Q. Did you report to the Air National Guard of the State of Maryland upon your return? A. I did.

Q. Were you assigned to duty in the Air National Guard of the State of Maryland upon your return? A. That is correct.

Q. What duties were you assigned at that time? A. Aircraft maintenance officer.

Q. With what unit? A. With the 104th Fighter Squadron.

Mr. Pettibone: This is off the record.

(Discussion off the record.)

Q. (By Mr. Pettibone) Now, after you were commissioned a second lieutenant in the Maryland Air National Guard in 1952, you stated previously that from time to time you attended training courses at training schools particularly a two weeks' period during the summer, is that correct? A. That is correct.

Q. Did you attend those training schools pursuant
348 to orders issued by some military headquarters? A. I am not familiar with the procedures necessary to direct me to this training.

Q. Well, isn't it true that when an officer such as yourself attends a training school normally written orders are cut by some Headquarters directing you to proceed to the school and take the course? A. That is the normal procedure, yes.

Q. And do you recollect whether or not such orders were cut covering your attendance at the training schools that you mentioned in your testimony? A. I assume they were, yes.

Q. Well, do you remember that they were cut? A. I don't truly remember that they were.

Q. Well, when you attended the training schools, isn't it the practice upon arrival to report to someone in pursuance to your orders? A. Are you referring now to the two weeks' summer training? Q. That is correct, yes. You testified that you went different places different sum-
349 mers to take training courses. A. That is correct.

Q. You recollect that? That is correct? A. That is correct.

Q. Now, when you went to those places which you have previously testified to, upon arrival at the training school or training center, did you report your arrival to anyone? A. I accompanied the entire 104th Fighter Squadron to those training sites.

Q. And do you have a recollection as to whether or not you presented any orders pertaining to you upon arrival

at any one of those training schools or centers? A. Not to my recollection.

Q. Well, do you recollect whether or not any orders on your behalf, covering perhaps the whole group of which you were a member, were so presented to anyone? A. I have no knowledge of it.

Q. Do you remember ever seeing any such orders? A. I have no recollection of seeing them.

Mr. Pettibone: Off the record.

(Discussion off the record.)

Q. (By Mr. Pettibone) Now, Captain McCoy, you
350 have also testified that during your period of service as a commissioned officer in the Air National Guard of the State of Maryland, that there were certain training requirements which you had to comply with, and also that there were various training schedules from time to time which you outlined the training that you and other commissioned officers in the unit would comply with. Do you recollect by whose authority those training schedules were issued to you and other members of your unit, or what Headquarters prepared and issued them, or by whose authority they were signed or made official? A. Is this the physical schedules of the training assemblies or the training required to be accomplished?

Q. Well, I have in mind both really, but separate the two items in your answer if you wish. A. To the best of my belief, the local Commander established the dates of the training assemblies.

Q. By the local Commander, do you mean the local Commander of your specific unit? In this case that would be Colonel Kilkowski? A. I believe at this time Major Scott.

351 Q. At this time Major Scott, but formerly Colonel Kilkowski? A. Formerly Colonel Kilkowski.

Q. And were those training schedules prepared on a written form and published, or maybe put up on the bulletin

board, or something like that? A. They were prepared in advance of the training assemblies, yes.

Q. About how long a period would be covered usually by training schedules of this type? A. I believe they are published for a six months period.

Q. Would the training schedule call for meetings or assemblies of members, of the commissioned officers, members of the unit? A. They would require the entire membership of the unit, both enlisted and commissioned, to perform their particular functions.

Q. About how often would the meetings take place? A. Roughly twice a month.

Q. Did you ever see any training schedules of this
352 type that were issued by anyone other than your unit commander? A. Not to my knowledge.

Q. Now, you testified previously that there was, in addition to the other National Guard Officers assigned to your unit, there was also a liaison officer, I think was the term used, usually an officer of the United States Air Force, is that correct? A. I believe his job description in this particular location is Air Advisor.

Q. I see. You had one commissioned officer then who was a commissioned officer in the United States Air Force, who was attached to your unit as an Air Advisor, filling this position, is that correct? A. That is correct.

Q. At the time of your commission and assignment to this unit, to the 104th Fighter Squadron, in 1952 until May 20, 1958, can you remember the names of the various officers who held this position of Air Advisor? And give the date approximately of each one, when they were in the unit, and I realize that this calls upon your memory and you may not be exact, but I don't mean to be
353 exact, but just approximately as you can recollect. A. In 1952?

Q. Yes. A. When I joined the unit, Lieutenant Colonel Van Ausdell—V-a-n A-u-s-d-e-l-l—and I believe in 1953

Lieutenant Colonel Dow—D-o-w—and I believe again in 1957 he was replaced by Major Britton—B-r-i-t-t-o-n.

Mr. Wolcott: What was his full name?

The Witness: Major Britton?

Mr. Wolcott: Yes.

The Witness: Milton D. Britton.

Q. (By Mr. Pettibone) Now, as a military officer yourself, you are familiar, I assume, with the expression commonly used in the Air Force and the Air National Guard and other military installations, called command authority, is that correct? A. I am, yes.

Q. Would any of these officers whom you have just named, who were attached to your unit as Air Advisor, in your opinion have command authority at any time over you as a commissioned officer in that unit?

354 Mr. Mudd: Just a minute. Objection. The question calls for a conclusion of law——

Mr. Pettibone: It calls for his opinion.

Mr. Mudd: —by the witness, or, as the question said, his opinion. I therefore object to it.

I do not instruct this witness not to answer, however.

Mr. Wolcott: Well, I want to join in the objection, and on the further ground that the witness has not stated what he understands the term command authority to be, and I think he should be first asked that in any event.

Mr. Pettibone: I think your point is well taken, Mr. Wolcott, very well taken.

Q. (By Mr. Pettibone) Captain McCoy, what is your understanding of the meaning of the term command responsibility in the military establishment?

Mr. Wolcott: Did you say authority or responsibility? Are you using the term command responsibility or command authority?

Mr. Pettibone: Command authority. Command authority. If I said responsibility, Mr. Reporter,

355 please correct my statement. It should be command authority.

Q. (By Mr. Pettibone) Could you tell us what that means, Captain McCoy? A. There are established command lines in my opinion that emanate from the president right on down, right through the lowest officer, in a chain or in an organization of a particular type.

Mr. Wolcott: You are talking about the President of the United States?

The Witness: That is correct, sir.

Mr. Wolcott: Yes.

Well, I still don't understand what is meant by it.

Mr. Mudd: Well, perhaps not what the witness has said what he understands by it.

Mr. Wolcott: Well, okay. It certainly left me in the dark.

Mr. Pettibone: I will be glad to furnish you with the Air Force publication, if there is one, I don't know that there is one.

Mr. Wolcott: Does that mean a chain of command,
356 may I ask?

Mr. Pettibone: Is this off the record now?

Mr. Wolcott: Yes.

(Discussion off the record.)

Q. (By Mr. Pettibone) Captain McCoy, did you ever individually receive any direct orders from any of the officers whom you have just mentioned, who filled the position of Air Advisor with your unit? A. None other than to respect the rank and the military position of a superior, to my knowledge.

Q. Now, you have testified previously in this proceeding that part of your duties with the 104th Fighter Squadron was to perform what you called check-outs on planes and instruments assigned to the unit.

What is embraced in the term check-out as you used it in that connection? A. The term I believe was flight check.

Q. All right. A. I might be corrected on that.

Q. All right. A. And the objective was to evalu-
357 ate the equipment for its fitness for flight or for its air readiness in the case of instruments or radio

equipment and to monitor the quality of maintenance performed at the installation.

Q. Did that sometimes involve your actually flying the equipment? A. It did.

Q. As pilot? A. That is correct.

Q. Now, when you performed such duties involving the flying of equipment for this purpose, was that done pursuant to someone's orders, some superior's orders? A. It is desirable that an aircraft maintenance officer be able to perform this duty, and I believe that can be found in the appropriate manuals.

Q. Yes, I realize that, but when you actually did perform the duty, was it performed pursuant to orders of anyone? A. In all cases flight orders were issued to perform these duties.

Q. Yes, and by whose authority, or in whose name
358 were the flight orders in those instances issued? A. The authority to operate the aircraft was issued by the Department of Air Force.

Q. I am referring now to flight orders to make a specific flight for the purpose which you have just described. Were those orders issued by the Department of Air Force? A. I assume the overall authority to operate the aircraft——

Q. No, I am not referring to that, but——

Mr. Wolcott: Please let the witness answer. You are interrupting the witness.

Mr. Pettibone: All right. I did not wish to interrupt him.

Mr. Wolcott: Now, clear up his answer. Let him finish his answer.

Q. (By Mr. Pettibone) Go ahead, state your answer. A. And in that connection, authority specifically delegated to the local Commander, who in turn issued the specific order to perform a specific flight.

Q. All right, now, we are referring——

Mr. Wolcott: Would you read that answer back? It does not sound very complete.

359 (Answer read by Reporter.)

Q. (By Mr. Pettibone) Where the specific orders for the specific flight——

Mr. Mudd: I think we would all agree that there was some part of his statement or answer that was t out.

Mr. Wolcott: That is right, because he started to say by authority——

Mr. Mudd: It is my understanding that he said they originally came down from the Air Force and they went to the local Commander.

Mr. Wolcott: That is the part that was left out.

Mr. Mudd: I wonder if we could clarify that on the record, Mr. McDonald?

(Testimony read by the Reporter.)

Mr. Mudd: Do you wish to add anything? You said, "I assume the overall authority", and then there was an interruption by Mr. Pettibone, and if Mr. Pettibone has no objection to letting him give his full answer.

Mr. Pettibone: Yes, let us supply the missing part, and I think he will probably be able to supply that, and then take up the rest of that.

360 The Witness: With the interruptions that have been in there, I am losing words.

Can I just make the whole answer over again?

Mr. Mudd: Go ahead.

Mr. Pettibone: Go ahead.

Mr. Wolcott: Go ahead.

The Witness: I assume that the overall authority to operate the aircraft is issued by the Department of Air Force, and then authority is subsequently delegated to the local Commanders to issue orders for a specific flight.

Q. (By Mr. Pettibone) Were the specific orders for the specific flight that you have described issued in each in-

stance by the Commander of your local unit, that is, the 104th Fights Squadron? A. To the best of my ability.

Q. You mean to the best of your recollection? A. To the best of my belief. I don't recall it.

Q. Yes. Yes. That would in other words be the base detachment Commander of your unit, either Colonel Kilkowski or Major Britton, or Major Scott, excuse me. A. I
361 believe this would be the Squadron Commander rather than the base detachment Commander.

Q. I see. And who would that be? Can you recollect the name of the Squadron Commander who issued those orders? A. Any particular year or flight?

Q. Oh, let us take the year 1958? A. Colonel Kilkowski was Squadron Commander at that time. I assume he would issue the orders.

Q. Were the other officers, the other Squadron officers who would issue such orders, also commissioned officers in the Air National Guard, assigned to your unit? A. Yes, sir.

Mr. Mudd: Objection, on the ground of materiality.

Go ahead and answer the question if you know.

A. I assume that they are in the Air National Guard, yes, sir.

Q. (By Mr. Pettibone) Now, in your previous testimony you have mentioned the fact that you were from time to time given check flights to test your flying proficiency.

In general, what is the nature of such a flight, and in general how is it conducted, just briefly? A. Certain in-
362 dividuals are assigned the duty annually to check the proficiency of the pilots of the unit and the standardization between the pilots with the unit, and they are given a flight check, the pilots are given a flight check by these individuals.

Q. Well, exactly what does that involve? Does that involve making a flight in a plane accompanied by the person giving the test? A. That is correct.

Q. Did you actually make such flights for such test purposes? A. I did.

Q. Since the time of your commissioning in 1952, about how many such flights did you make for test purposes? A. I don't recall.

Q. Well, about how often do you make these flights? Is it once a year or more frequently or less frequently than that? A. I believe it is annually.

Q. Were the individuals who gave you these tests members of the unit to which you were assigned? A. Probably.

363 Q. That is to say, were they commissioned officers assigned to the same unit as yourself? A. To the best of my recollection, yes.

Q. Do you remember the names of any of them? A. I don't at this moment.

Q. Were you ever given a check, a test flight for such checking purposes, by anyone other than a member assigned to the same unit as yourself? A. In my original answer in this line of questions I referred to the standardization for proficiency flight check.

Q. Yes. A. To my knowledge, I can't recall any member other than a member assigned or attached to the 104th Fighter Squadron that performed such a check with me.

Q. Now, Captain McCoy, in addition to being commissioned officer, a flight officer, a pilot in the 104th Fighter Squadron, you were also a civilian employee of that unit, is that correct? A. I am not quite sure what status I was.

364 Q. Well, you testified before, if I remember correctly, you said you had a dual status: You were a commissioned officer in the Air National Guard, assigned to this unit, and we have just gone over the assignment, your assignment to this unit, and your service with it from 1952 to the present time. Now I am turning to something else. You were also in addition to being a commissioned officer, you were also a civilian employee for a particular purpose, which we will go into in a moment, in the unit, is that correct?

Mr. Mudd: Go ahead and answer it if you can.

A. I cannot answer this question truthfully. I am required to wear the uniform that I presently have on during my status as an Air Technician, and I cannot truthfully answer your question.

Q. (By Mr. Pettibone) Well, aren't you aware of the fact that you were and are a civilian employee of the 104th Fighter Squadron as well as being a commissioned officer in it? A. Again, I cannot be positive as to the status.

Mr. Pettibone: Will the Reporter mark this document as United States Exhibit No. 3 for identification?

(Special Orders referred to marked U. S. Exhibit 3 for identification.)

365 Mr. Pettibone: I would like to ask the witness to look at Exhibit No. 3 for identification.

(Paper handed to and examined by witness.)

Mr. Wolcott: May I ask you on the record, Mr. Pettibone, what PAC means?

Mr. Mudd: Similar to authority contained in——

Mr. Wolcott: What does ANGR mean?

Mr. Mudd: National Guard Regulations.

Mr. Pettibone: In case you have any question as to the extract, the part excluded does not pertain to the witness or having anything to do with this matter that we are dealing with here.

Mr. Wolcott: Yes.

Mr. Pettibone: But I will be glad to give you the whole order.

Mr. Wolcott: Well, I assume the same comment applies to all of these.

Mr. Pettibone: Yes, that is right.

Mr. Wolcott: May I ask you on the record, Mr. Pettibone, what assistant U. S. P. & F. O. means?

Mr. Pettibone: It is an abbreviation for United
366 States Property & Fiscal Officer.

Mr. Wolcott: I see.

Mr. Pettibone: As I am informed by competent Air Force authority.

Mr. Mudd: And put that in capitals, Mr. McDonald. Let the record show he is referring to Major Prince.

Q. (By Mr. Pettibone) Captain McCoy, referring to United States Exhibit No. 3 for identification, have you seen this document before at any time? I don't mean this specific one. I mean the original of which this is a copy or another copy of it. A. I have.

Q. In the second line of United States Exhibit No. 3 you will see the term, "Air National Guard Civilian Personnel Program". Do you know what that means or what it refers to? A. I assume that it has reference to some portion of the Air National Guard Regulation 40-01.

Q. Do you know whether or not it provides a program or procedure for the employment of civilian personnel by the National Guard?

Mr. Mudd: Objected to.

367 Mr. Wolcott: All right, objected to.

Are you referring to the personal knowledge of the witness?

Mr. Pettibone: Yes, I am asking him whether he knows.

Mr. Kieffer: Just a minute. For the record I would like to have it stated, although formal objections are waived, I wish to concur in all objections previously made and subsequently made that I did not individually object to.

And that goes on behalf of Mr. Galiher and his clients, and Mr. Davidson and his clients.

Mr. Pettibone: Well, I am sorry, Mr. Kieffer, but I could not agree to let a statement of that kind pass without comment.

If you have an objection on form, in accordance with our procedure here, you will have to make your objection, the same as the rest of us have. I could not agree to any other procedure.

Mr. Kieffer: Well, I believe this is a general discovery deposition, and under the Rules, of course, no objections are waived at the trial.

368 Do you prefer from now on that I concur in all objections made with Mr. Wolcott?

Mr. Pettibone: At the beginning of this deposition of the witness, you were not present at that time, I believe, but it was agreed that any objection as to form would be made here and now during the taking of the deposition of the witness, and that was the basis upon which we agreed that we would conduct this deposition. At least that is my understanding of it. And there are other people here who can concur in that. So in accordance with that, so far as I am concerned, I cannot make any exception to what was to be the procedure, and objections as to form have to be made here and now.

Mr. Kieffer: At this time I wish to concur in the objection which is made.

Q. (By Mr. Pettibone) Will you answer the question?

Mr. Wolcott: What is the question?

(Question read by the Reporter.)

Mr. Wolcott: Are you objecting, Mr. Mudd?

Mr. Mudd: Well, I made the original objection.

Mr. Wolcott: Yes.

369 Mr. Mudd: Of course, obviously this is a long way from the best evidence, but if you are testing his knowledge of the regulation, I will let him answer. Of course, what he says or what he understands does not necessarily prove what the program provides.

Mr. Pettibone: Well, we all realize that a lot of the things that he testified to here thus far have not always been the best evidence on the point.

Mr. Mudd: No, but presumably on some of these technical regulations, it may not be correct. The point I am making is that to test this witness on the contents of various regulations is extending the record really without any authoritative source, you might say.

Mr. Pettibone: If I have been very technical, I would certainly have to agree with you, but I really only asked

him very broad general matters. Now, maybe I am in error, but I assume that matters in the general knowledge of a commissioned officer with his rank in the Air National Guard would be admissible.

I am trying very hard not to be very technical about the regulations, and naturally they will speak for
370 themselves anyhow.

Mr. Mudd: That is right, that is right.

Mr. Pettibone: I am asking him in a general way if he is familiar with the general civilian employment program of the National Guard.

Q. (By Mr. Pettibone) Now, will you please answer the question? A. I know that Air National Guard Regulation 40-01 provides certain information and certain requirements for the Air Technician Program. As to the status of the individual, again I am not positive.

Q. Well, you testified previously that you took a course of instruction at the Chanute Air Force Base back in 1955 and 1956, a course of training for aircraft maintenance personnel.

Now, upon the completion of that course you stated that you returned to your unit here in the Baltimore area. Were you given any duties in connection with aircraft maintenance upon your return to your unit at that time? A. As I stated, I was assigned the duties of an aircraft maintenance officer.

371 Q. And how were you paid for those duties? A. I was paid at the rate of pay commensurate with the rank of aircraft maintenance officer in the Maryland Air National Guard.

Q. What was your title? A. Aircraft maintenance officer.

Q. Now, I am referring to 1956. Well, what was the date when you first took over these duties as an officer in aircraft maintenance? It was in 1956, was it not? A. 1956, yes.

Q. Do you remember the exact date? A. I do not.

Q. The month? A. June, I believe.

Q. All right, in June of 1956. What was your title at

that time? A. I was aircraft maintenance officer of the 104th Fighter Squadron, Maryland Air National Guard.

Q. Did you have any other title? A. In the Air National Guard?

Q. In the 104th Fighter Squadron, your unit.

372 Mr. Mudd: You mean other than rank, I presume.

Mr. Pettibone: That is correct.

Mr. Mudd: Do you mind if he consults with me?

Mr. Pettibone: No, go ahead.

(Mr. Mudd and witness in conference.)

A. I was base maintenance supervisor for the 104th Fighter Squadron as an Air Technician.

Q. (By Mr. Pettibone) Is that a capacity other than your capacity as a commissioned officer in the Air National Guard at that time? A. I believe that the Regulation requires that the base maintenance supervisor be a commissioned officer in the Air National Guard. That is my belief.

Q. What Regulation? What are you referring to? A. ANGR 40-01.

Q. Yes, that is true, but let me go back to my question now, because my question was a little different than that. Is that status or position different from and in addition to let me say being a commissioned officer in the Air National Guard? I understand that you have to be a

375 commissioned officer to hold this position, but what I am getting at is, is this a different position? A. I think I have stated that, Mr. Pettibone.

Q. No, you have not, not yet. A. I was an aircraft maintenance officer in the Air National Guard and held the job title in addition as Base Maintenance Supervisor, and to perform these duties, or to have this job description, I had to be a commissioned officer in the Air National Guard. If they are separate, I don't know.

Q. Did you receive separate pay in each of these capacities? A. I did.

Q. From a different source? A. I think both pay checks were drawn on the Treasury of the United States.

Q. Were you paid at the same time or different times? A. Not necessarily at the same time.

Q. Referring to United States Exhibit No. 3 for identification, in the sixth line under the words "Base Maintenance Supervisor"—the word maintenance being
374 abbreviated as Maint, there appear the letters NGC-11. Do you see those? A. I do.

Q. Do you know what they stand for, or what they represent, or what they mean, or what they refer to? A. I believe that is a rating issued by the National Guard Bureau for Air Technician Manning purposes.

Q. And following those letters and numbers, you see further letters, S-2 and then eff, followed by a date, 16 December '57, also abbreviated. Do you know what that stands for, refers to our means, and if so, tell us. A. I believe that refers to the step, in this case Step 2, and the effective date that I attained that step.

Q. All right. Prior to May 13, 1958, then, you were a base maintenance supervisor in the 104th Fighter Squadron, as indicated herein, is that correct? A. That is correct.

Q. And then to the right of Base Maintenance Supervisor you see the term Aircraft Maintenance Chief, the word Aircraft being abbreviated, Acft. Is that another technician's position to which you were transferred on May 13, 1959?

375 Mr. Wolcott: '58.

Mr. Pettibone: 1958, excuse me.

The Witness: 16 May '58.

Mr. Mudd: I think it says effective May 16th.

Mr. Pettibone: Yes, you are correct. The order appears to be dated May 30th, but the effective date is May 16, by its own terms.

The Witness: That is correct.

Q. (By Mr. Pettibone) Now, tell us just briefly the general nature of your duties as air technician during the pe-

riod you were employed as base maintenance supervisor. A. I had overall supervision of vehicles, crash equipment, ground support equipment in the various shops and other support areas of aircraft maintenance and the responsibility for aircraft maintenance.

Q. All right. Then after your transfer to the position of aircraft maintenance chief on 16 May 1958, did you thereafter have different duties as air technician? A. I had fewer duties. I relinquished certain areas to another individual.

376 Q. Just describe briefly in a general way your duties as air technical after you became aircraft maintenance chief? A. I was concerned with aircraft maintenance and limited support for it as opposed to the overall base maintenance supervision prior to that date.

Q. Did you enter upon and perform duties of that position commencing on May 16, 1958? A. I did.

Q. Does that position require you to be a commissioned officer in the Air National Guard? A. To the best of my belief the Regulation says commissioned officer, warrant officer or—I don't recall if it is civilian or master sergeant. Maybe both.

Q. Did the change of position on May 16, 1958, which you just described, involve an increase in pay or salary for you? A. I believe the salary was the same or slightly more.

Q. Who was your immediate supervisor in your capacity as aircraft maintenance chief? A. Major Jesse D. Mitchell.

377 Q. What was the nature or extent of his supervision of your work? A. He assumed the duties of base maintenance supervisor.

Q. Is that the position which you had held previous to that time? A. That is correct.

Q. You mean the person who assumed your old position became your supervisor in your new position? A. That is correct.

Would you repeat the question again, please?

Mr. Pettibone: May I ask the Reporter to read it to you?

(Testimony read by Reporter.)

A. Yes.

Q. (By Mr. Pettibone) Referring to the United States Exhibit 3, in the seventh line of the test of this order, underneath the term aircraft maintenance chief, I see the letters NCMS-9. Do you know what those letters and number mean or refer to? A. The letters to the best of my belief and the related number designate a rate in
378 the air technician's manning document.

Mr. Wolcott: In what document?

The Witness: In the air technician manning document.

Q. (By Mr. Pettibone) What does the S-3 mean following it? A. That would indicate the step in the rate.

Q. And the letters eff I take it mean effective date of your entering into this position? A. That is right.

Q. May 16, 1958, is that correct? A. That is correct.

Q. Were you notified by anyone on or before May 16, 1958 that you were going to be transferred from the position of base maintenance supervisor to that of aircraft maintenance chief? A. I was.

Q. By whom? A. I believe Colonel Kilkowski.

Q. Do you recollect who notified you before your appointment as base maintenance supervisor? Who
379 informed you that you would be appointed to that position? A. Major Scott.

Q. That would be back in 1956? A. 1955.

Q. Did you apply to Major Scott for that position, either verbally or in writing? A. Yes.

Q. Did he discuss your qualifications for the position with you? A. He did.

Q. Did you inquire as to the rate of pay for the position? A. Very possibly.

Q. Did you discuss with him the general nature of the work and the nature of your duties? A. Probably.

Q. Were you at the time you first entered upon the position as base maintenance supervisor already assigned to the 104th Fighter Squadron as a commission officer? A. I was.

Q. How long had you been so assigned to it, sir?

380 A. Since January of 1952.

Q. And when you were transferred to the position of aircraft maintenance chief, on the effective date of May 16, 1958, did you request this transfer? A. I requested the new position, yes.

Q. To whom did you make the request? A. Colonel Kilkowski.

Q. Did you discuss with him what your duties would be in the position of aircraft maintenance chief? A. I did.

Q. Did you see any written description of your duties as aircraft maintenance chief? A. Very probably, yes, sir.

Q. Was that on the occasion when you discussed your transfer to this position with Colonel Kilkowski? A. I don't recall the exact date.

Q. Approximately at that time, though? A. Approximately at that time, yes.

Q. Do you have a copy of that description of your duty as aircraft maintenance chief at the present time? A. There is a copy on file at the 104th Fighter

381 Squadron.

Q. You have read it, have you? A. I have.

Q. Had you read it on or before May 20, 1958? A. I had.

Q. Let me rephrase my question.

Had you read it before May 20, 1958? A. I had.

Q. Was there a written description of your duties as base maintenance supervisor on file at the Headquarters of your Squadron before May 20, 1958, at your old job? A. There was a copy on file.

Mr. Wolcott: Will you identify the document, Mr. Pettibone, instead of getting a description of it?

Mr. Pettibone: I will do that.

Q. (By Mr. Pettibone) Had you read it? A. I had.

Mr. Pettibone: Will the Reporter mark this, please, as United States Exhibit No. 4 for identification?

(Outline of duties of Aircraft Maintenance Chief referred to marked U. S. Exhibit No. 4 for identification.)

382 Mr. Wolcott: What is this up at the top there, Mr. Pettibone?

Mr. Pettibone: Is this off the record?

Mr. Wolcott: Yes.

(Discussion off the record.)

Q. (By Mr. Pettibone): Referring to United States Exhibit No. 4 for identification, do you know what this document is, Captain McCoy? A. I do.

Q. Can you tell us what it is, or what it is a copy of? A. It is a job description of aircraft maintenance chief, and it is an extract of the Air National Guard Manual, 40-01.

Mr. Wolcott: Well, isn't there an overall title, Civilian Personnel Manual?

Mr. Pettibone: You have it there.

Mr. Wolcott: I mean is this where this comes from, the Civilian Personnel Manual?

Mr. Pettibone: That is right.

Mr. Wolcott: All right.

383 Q. (By Mr. Pettibone) Is this document which we have identified as United States Exhibit No. 4 for identification the same as the description of your duties as aircraft maintenance chief on file with your unit that you just referred to in your testimony? A. This is the document I have reference to.

Q. This is a copy of the same document, is that what you mean? A. That is right.

Q. And does it describe the duties which you began performing on May 16, 1958? A. Let me state at this time that Major Mitchell had not returned from the aircraft maintenance school, and I was still acting as his subordi-

nate or second in command, performing those functions of the overall base maintenance supervision in addition to those listed in the manual.

Q. You mean you held two positions on May 16, 1950? A. As Major Mitchell's second in command I was responsible for overseeing certain functions that he would normally oversee had he been present.

Q. All right. And when did he return to the unit?
384 A. In November of 1958.

Q. So that during that period of time from—was it May 16th until November of '58, in his absence you had been looking after his duties as well as your own, is that what you mean? A. I had the responsibility for certain areas for this aircraft maintenance care.

Q. And then after he returned in November of 1958, you performed only the duties described generally in United States Exhibit No. 4, those prescribed for aircraft maintenance chief? A. That is correct.

Q. Do you recollect whether you performed any specific duties other than those described in United States Exhibit No. 4 on May 20, 1958? A. Other than these?

Q. Other than these listed in Exhibit 4 for identification. A. As Air Technician?

Q. That is right. A. I have no knowledge of any
385 specific duties. It is there possibly.

Q. I am referring now, of course, to your duties as Air Technician. A. That is correct.

Q. And those duties specifically described in Exhibit 4, for aircraft maintenance chief, and I am referring specifically to May 20, 1958.

Perhaps you answered this already, and if so, forgive me, but maybe I am a little confused, and I would like to get it straight. What I mean, did you perform any duties other than those referred to on that day as far as you remember?

Mr. Wolcott: I object to that in form. It is too broad, and it calls for a conclusion on the part of the witness, and a conclusion of law.

Mr. Pettibone: Well, I will be glad to try to reform the question so that it will be admissible.

Specify the part which you object to.

Mr. Wolcott: Well, I have stated my objection.

Mr. Pettibone: Well, I am afraid I do not understand it then. Could you make it more specific?

386 Mr. Wolcott: I think my objection stands on the record, and I don't feel it is necessary to add to it.

Mr. Pettibone: Well, all right, let the Reporter please read to me from the record the statement of the objection made by Mr. Wolcott.

(Statement referred to then read by Reporter.)

Mr. Wolcott: I think you ought to be specific.

Mr. Pettibone: I will withdraw the question and rephrase it as follows.

Q. (By Mr. Pettibone) Referring to United States Exhibit No. 4 for identification, in your capacity as Air Technician did you perform any duties on May 20, 1958 in addition to or other than those listed therein?

Mr. Wolcott: Objection. Whatever he performed cannot be characterized. You can ask him what he did. Now you are asking him to characterize it.

Q. (By Mr. Pettibone) All right, subject to that change, instead of saying what duties did you perform, did you do anything then other than the activities listed in this exhibit?

Mr. Wolcott: I make the same objection, on the

387 same grounds.

Q. (By Mr. Pettibone) All right, answer it.

Mr. Buckmaster: He stated he performed other duties.

Mr. Wolcott: He stated that he performed other duties.

Mr. Buckmaster: As supervisor.

Mr. Wolcott: I am sorry, I did not hear it.

I would like the witness to answer it.

The Witness: My answer was very possibly I performed other duties.

Mr. Wolcott: That is correct.

The Witness: I don't recall specifically any duties.

Mr. Wolcott: That is what he said.

Q. (By Mr. Pettibone) Prior to May 16, 1958, while you were base maintenance supervisor, who was your immediate superior, to whom you were responsible for the performance of your duties? A. Colonel Kilkowski.

388 Q. And on and after May 16, 1958, when you became aircraft maintenance chief, who initially was your superior, to whom you were responsible for the performance of your duties? A. Major Mitchell held the job as base maintenance supervisor. However, in his absence Colonel Kilkowski was my immediate supervisor.

Q. That would be from the period of May 16th to November of 1958? A. That is correct.

Q. And then is it correct that in November, when Major Mitchell returned to the unit, he became your immediate supervisor? A. That is correct.

Q. How many hours were you required to work per week in your capacity as aircraft maintenance chief? A. I can best answer that by saying that to the best of my belief a normal work week was a forty hour week.

Q. Did you actually work forty hours per week? A. To the best of my belief, yes.

Mr. Wolcott: Excuse me but——

389 Q. (By Mr. Pettibone) Were time records kept of how many hours you worked per week? A. I assume so.

Mr. Wolcott: Excuse me, but may I inquire——

Off the record.

(Discussion off the record.)

(Thereupon, at 12:30 o'clock p.m., a recess was taken until 1:30 o'clock p.m.)

AFTER RECESS

Q. (By Mr. Pettibone) Now, referring to your activity, first as base maintenance supervisor, and then subsequently as aircraft maintenance chief, you testified I believe just before the recess that you worked forty hours a week. What time did you normally start to work in the morning? A. Well, the normal work week hours from 8:30—or, excuse me, 8 o'clock in the morning to 4:30 in the afternoon, Tuesday through Saturday.

Q. Did you check in with anyone when you reported for work in the morning normally? Did you have a time
390 clock? What system was there if any? A. We have a roll-call type of system rather than time clock, whereby your attendance is recorded on a roster.

Q. You mean someone who called the roll or read the roster every morning? A. This is true in the case of everyone except the officers.

Q. Well, I am referring to other than air technicians or other civilian employees of the unit. What system was maintained of keeping records of their working hours? A. That is an overall administrative function that I am not qualified to go into too deeply. However, the employees, with the exception of those people who wore an officer's uniform, were required to attend the roll call.

Q. Well, about how many people in those air technician jobs wore officers' uniforms in say May of 1958? A. Approximately seven.

Q. And about how many others were there who were not officers, who did not wear the officer's uniform? A. Approximately 120.

Q. Were you the only aircraft maintenance chief? A. That is correct.

391 Q. Were you the only base maintenance supervisor prior to May 16, 1958? A. That is correct.

Q. Approximately how many people would you supervise while you were base maintenance supervisor? A. Approximately 80 people.

Q. And about how many did you supervise after you became aircraft maintenance chief? A. Approximately 40. These are all approximations.

Q. I understand, yes. A. This is after I assumed the duties of aircraft maintenance chief, when Major Mitchell had joined our staff.

Q. If you were not present for duty or actually on duty in your capacity as aircraft maintenance chief, or before that as base maintenance supervisor, at any time between 8:30—and did you say 5 o'clock? A. 8 to 4:30.

Q. 8 to 4:30. Excuse me. A. Between 8 and 4:30.

Q. Between 8 and 4:30, on the work days Tuesday through Saturday inclusive, did you have to report
392 your absence to anyone? A. In the interest of good management, our absence was reported, yes, to a superior and to a subordinate.

Q. Well, suppose you were sick some morning—were you ever sick and for that reason did not go down to work in the morning? A. Yes.

Q. That has happened? A. That has happened.

Q. And what would you do in those cases? Call up and tell anyone? A. That is right.

Q. Who would you call? A. Two people: The Commander and the person responsible for making the appropriate entries in the attendance form.

Q. Now, were you entitled to a certain amount of sick leave under certain conditions? A. That is correct.

Q. Do you know how much sick leave you were entitled to per year, or per week, or however it was, what-
393 ever the system was? Tell us what it was. A. I believe at that time it was accrued at the rate of 120 hours of sick leave per year.

Q. By that time, you are referring to 1958? A. May 1958, or at the time I took over the duties of aircraft maintenance.

Q. It was measured in terms of hours, is that correct? A. That is correct.

Q. And were the hours credited if you were entitled to cumulative pay over a period of time? A. They were.

Q. Now, if you were absent for other reasons other than sickness, if you wanted to just have some absence to do something of a personal nature, were you entitled to take a certain amount of leave for that purpose? A. We were.

Q. Do you remember how much or what the system was on that? A. I believe that accrued at the same rate, 120 hours a year.

Q. And if you wanted to have such leave, did you
394 apply for it in advance? A. That is normal procedure, yes.

Q. To the same people that you notified in cases of sickness? A. That is correct.

Q. Who are these people, by the way? A. That would be the Commander and——.

Q. You mean the Base Detachment Commander? A. The Base Detachment Commander.

Q. Yes. And the other one—— A. ——would be the administrative clerk who would be responsible for maintaining the records.

Q. You mean the administrative clerk who kept the time and attendance records? A. That is correct.

Q. Was your pay based upon those time and attendance records, do you know? I am talking about your pay now, and I am speaking about the base supervisor, or, rather, aircraft maintenance supervisor. A. It is my understanding, yes, it was based on the number of hours that you were in attendance or legally absent.

395 Q. All right, if you exceed the number of hours authorized for sick leave, or for vacation, or annual leave, whatever the exact term would be, if you exceeded the number of allocated number of hours, did you suffer a reduction in pay? A. I understand you would.

Q. I take it that never happened in your case, though. A. Not to my knowledge.

Q. All right. Now, were there any other kinds of leave that you were authorized to use besides the two that I

have already mentioned? A. Your authorized leaves were attendance at the summer encampment, summer training.

Q. That would be for those two weeks, the normal two weeks period that you mentioned before in your testimony? A. That is right.

Q. What kind of leave would that be called- I take it that is apart from those other two as we have talked about, annual leave and sick leave. A. That is correct.

Q. Would that be perhaps called military duty or
396 something like that? A. I suppose that is the general term of it.

Q. Anyhow, the hours of leave which were used in that manner were separate and apart from leaves which you used in those other categories? A. To my understanding, yes.

Q. That applied when you went to summer training periods. Did it apply to any other time? Were there any other training periods for example than this summer encampment that you have referred to where that kind of leave could be taken from your civilian or from your employment as aircraft maintenance chief? A. Only for special reasons. I know of no set policy.

Q. Now, during the course of a year, in addition to these two weeks summer training periods, you also had other training periods, didn't you, that lasted for maybe a couple of hours at a time, some kind of weekly meeting, perhaps, something like that? A. We had our training assemblies, that generally lasted the entire day.

Q. That was training in connection with your
397 status as Captain, or before that as a Lieutenant in the Air National Guard? Would that be the nature of that training? A. That is correct.

Q. And would you say these periods would last all day when you had them? A. That is correct.

Q. About what time would they start in the morning? A. The general training assembly started at nine o'clock in the morning.

Q. Yes. And how often approximately did you attend these, say during the year 1958? A. Roughly twice a month.

Q. And on what days of the week would they normally come? A. They were on Saturdays.

Q. Would you take leave from your job as Aircraft Maintenance Chief or Base Maintenance Supervisor in any form to attend those sessions? A. Not necessarily.

Q. Well, you mean you were present for duty in your capacity as Base Maintenance Supervisor or Air-
398 craft Maintenance Chief on those Saturdays? A. No, sir.

Q. You were not? Well, how were you carried on the records? A. I stated that normally our work week is Tuesday through Saturday.

Q. Yes. Well, Saturday is a work day then normally? A. Normally.

Q. And then those meetings I understood came on Saturday? A. That is right.

Q. Now, how were you carried on the time and attendance records as respects your job as aircraft maintenance chief? A. I say again the normal work week is Tuesday through Saturday. However, where a general assembly interfered with a normal work week, then as air technician you could compensate your air technician status by working another day, Sunday or Monday, or possibly on a night duty of some kind.

Q. Oh, I see. In other words, you ended up in any given week as spending actually forty hours on your air
399 technician's job? A. That is correct.

Q. And if your training period happened to come in a normal work week, you worked some other day? A. That is correct.

Q. Now, in other words, any time that you spent in training as distinguished from working at your air technician's job, that was made up that week, or at least in and around that time, by working at other times, so that your total

time spent working at your air technician's job averaged out forty hours a week? A. That is correct.

Q. Now, part of your training duties and requirements in your capacity as a Captain in the unit, and before that as a lieutenant, were used in making training flights, is that correct? A. I had a commitment to fill the training criteria.

Q. Let me put it this way: You did from time to time make training flights? A. That is correct.

Q. And in which you took an airplane and piloted
400 it to some place for a period of time. Did you ever make any of those flights during the normal working hours you have mentioned in connection with your air technician's job, that is to say, between eight and four-thirty, Tuesday to Saturday? A. I did.

Q. And did you do that frequently or infrequently or about how often would you say? Let us take the year 1958. A. I don't know how often this could be determined.

Q. Well, I realize that, but in a general way, would you say once every, oh, say once every month, or more often or less days than that? A. More often.

Q. Once a week perhaps? A. Perhaps.

Q. And what was the average?

Mr. Wolcott: Wouldn't the flight records show that?

Mr. Pettibone: Yes.

Mr. Wolcott: I am sorry.

Q. (By Mr. Pettibone) About how long—if those flights had an average length or duration, about how long
401 would that be? Would you normally make a flight for an hour, or several hours, or perhaps you can't say.

Mr. Wolcott: I object to the form of the question.

Mr. Pettibone: Let me reframe it. I will withdraw it.

Q. (By Mr. Pettibone) Now, what was the average length of time or duration of those flights? A. I would assume the training flights were generally from an hour to an hour and a half in duration.

Q. When you would make such flights during a normal day's working hours, for an air technician such as yourself, did you make up that time at some other time during the week, the same as you did with the other training? A. Not necessarily.

Q. How were you carried on the roster during that period as to time and attendance in your air technician's capacity or employment? A. Present.

Q. Well, did you sometimes make up the time consumed in the training flights by working extra hours that week?

Mr. Wolcott: I object to that. It has already
402 been answered.

Mr. Pettibone: No, he said sometimes, and I want to know what it is.

The Witness: I said not necessarily.

Q. (By Mr. Pettibone) Well, that is not an answer to the question, really. That is not an answer at all. And I would like to have the answer to it.

Mr. Wolcott: I object to you arguing with the witness.

Mr. Mudd: Let us retrench now. What is the question? Did he ever make up the time that he spent in flying away from his air technician's weekly and hourly requirements?

Mr. Pettibone: Yes.

Mr. Mudd: All right.

Can you answer that, please?

A. Well, I am not aware that that requirement existed

Mr. Mudd: All right.

Mr. Wolcott: All right.

Q. (By Mr. Pettibone) I am sorry, but that still
403 is not an answer to my question.

Mr. Wolcott: He has answered it.

Mr. Pettibone: That is not an answer to my question.

A. I don't recall. Let me answer it this way: I don't recall that specific instance where I set aside a portion of the time to compensate the air technician program for having flown. However, there may have been many times that I gave time too. I don't remember that there is any

specific instance that I can say that I deliberately set aside a portion of the time to compensate the air technician's program.

Q. (By Mr. Pettibone) Well, could you state it the other way around? Were there any times when you did compensate for your air technician's program, as you call it, by working additional hours?

Mr. Wolcott: I submit he has already answered it.

Mr. Pettibone: No, he has not answered this question.

Mr. Wolcott: Before that, he answered this particular question.

Q. (By Mr. Pettibone) Well, there is a question.
404 Will you answer it, please? A. I don't recall any particular instance that I worked any additional hours to compensate the time I may have flown during a normal working day.

Q. Well, then, in other words, you used some of these forty hours per week on your air technician's time, in some part of that time each week, or some weeks, at least, that was devoted to flying?

Mr. Mudd: Objected to. The witness has not said that, Mr. Pettibone, but he said——

Mr. Pettibone: Then I would like to have him correct me where I am wrong. That is what I am asking him, is that right or wrong.

Mr. Mudd: Just a moment. I object to the suppositions contained in your question and the inaccurate conclusions drawn from the witness' answers. He said he does not recollect. He has not said it did not happen or it did happen, but he does not recollect, and there is a major distinction there.

Mr. Wolcott: Well, just to put in my objection here, I don't quite agree with either Mr. Pettibone's or
405 Mr. Mudd's summary. As I understand it the witness has already testified that he flew a part of his training program during the hours from 8 to 4:30. He said that a number of times. And I don't think that it can

be summed up or characterized, because the record already states what he says about it.

Mr. Kieffer: I concur in that objection.

Q. (By Mr. Pettibone) Well, then, apart from any specific instances, do you have any recollection in general as to whether or not you worked extra hours to compensate for the time during normal working hours in a week you might have spent in training flights?

Mr. Kieffer: I object.

Mr. Wolcott: I object too. He has already answered it several times.

Q. (By Mr. Pettibone) Well, answer it again, anyhow. A. The only answer I can give you, Mr. Pettibone, is that I have no recollection of compensating the air technician's program for any portion of the time that I may have used for flying, as a specific case, or as a general case.

I might make one addition to the answer.

Q. You mean you want to change your answer?

406 A. No, I don't want to change my answer, Mr. Pettibone. I would like to make an addition to the answer.

Q. All right. A. We are authorized, or as a pilot you are authorized certain flight training periods.

Q. By whom? A. By the National Guard Unit, by order of the Air Force, as I understand it, in which case you can by satisfying certain requirements, such as time spent flying and time spent in certain other functions, receive compensation, I believe to the amount of one day's pay per flight training period, and there have been cases possibly where I flew as an air technician, in air technician work, during an air technician's work day, and the time taken from that was subsequently made up to satisfy the air technician's work day and the flight training period requirements.

Q. Were you told by your counsel to give this additional information and perhaps add it to your previous answer to my question?

Mr. Mudd: Mr. Pettibone, if you had been looking at

this end of the table, you would have seen him lean
407 to me and asked me if he could make an addition to it, and I said, "Yes, go ahead and make the addition." I have had no conversation whatsoever with Captain McCoy, and I resent Mr. Pettibone's suggestion.

Mr. Pettibone: I just inquired how it happened.

Mr. Mudd: No, you did not just inquire either. And I will ask Mr. Wolcott, sitting right across the table, if my statement is not correct.

Mr. Wolcott: That was my impression.

Mr. Pettibone: Well, I don't think it serves any purpose for us to go into it.

Mr. Mudd: I should say it does not.

Q. (By Mr. Pettibone) Let me ask you this, Captain McCoy, do you receive any compensation from anyone for the time you spent in flying status, that is to say, when you performed those training flights that we are referring to? A. There are a certain maximum number of flight training periods that a pilot can accomplish throughout a year, or a quarter, and during the training assemblies is the only compensation to my understanding you can receive for flying. However, flights may be conducted beyond
408 these periods.

Q. Well, if you fly the normal number of required hours, do you receive compensation of some kind for it? A. Required to what extent?

Q. Well, you just mentioned certain requirements, that you had to spend so much time flying. Didn't you have to spend so many hours then in a given period, say such as a year, in order to maintain a certain status? There are requirements to that effect, are there not? A. The requirement is not to satisfy a monetary charge.

Q. No, the number of hours, I said. I did not mention monetary. A. This number of hours is specified by the regulations, and I would have to fly more hours, for me to accomplish a certain amount of flying training.

Q. All right, so you have to spend, in order to comply

with this regulation, you have to actually spend so much time flying, do you not? A. That is correct.

Q. Now, my question is this: If you spend that amount of time that is required, do you receive any monetary compensation for it? A. Possibly.

Q. Well, do you happen to know? A. Possibly.

Q. Does that mean yes? A. It does not mean yes or no, Mr. Pettibone.

Q. Does it mean that you don't know? A. Mr. Pettibone, I may or may not receive compensation for flying.

Q. That is not an answer to my question.

Mr. Mudd: That is the witness' answer.

Mr. Pettibone: I want an answer to the question to the witness.

Mr. Mudd: That is the witness' answer.

Mr. Pettibone: You know it is not the answer, Mr. Mudd.

Mr. Mudd: Well, that is the witness' answer.

Mr. Pettibone: Mr. Mudd, I wish you would bear in mind that I have the right under the Rules of Civil Procedure under the Rules to stop this proceeding at this point and go before a Court and request the Court to instruct the witness to answer a direct and precise question in a matter of this kind.

Mr. Mudd: That is your option. He has answered the question.

Mr. Pettibone: That is not an answer to my question.

Mr. Mudd: That is your option. But you are making the accusation that the witness knows it.

Mr. Pettibone: I don't make that accusation, and if you are making the statement that I am making that accusation, I deny that I am making any accusations, or that I made any. I did not make any accusations, and I am not making any accusations. So the record is straightened out on that point.

Mr. Mudd: Well, the record is there.

The Witness: Will you restate your question, Mr. Pettibone, and maybe I can be more specific in the answer.

Mr. Pettibone: All right, let me ask the Reporter to please re-read the question.

(Question read by the Reporter.)

A. I can answer it this way, Mr. Pettibone, that it
411 is very possible that I can fly on the 24 training assemblies that they have during the year, and I would receive compensation, but I might not satisfy the requirements as laid down by the Department of the Air Force and who placed me on flying status, and then I would be required to fly on other days without necessarily being compensated.

Q. (By Mr. Pettibone) Well, if you did satisfy the requirements of the Air Force Regulations, would the flying which you did to satisfy them result in your receiving monetary compensation? A. I don't believe it would be possible to satisfy them in 24 days.

Q. I don't understand what you mean by satisfying them in 24 days. I mean satisfying them in whatever time period the regulation itself provides. A. Well, I get paid for 24 training assemblies per year. All forty-eight training assemblies that were accomplished in 24 days.

Q. Yes, and that means any 24 days out of a calendar year? A. That is not true necessarily.

412 Q. Well, 24 days out of a calendar year? A. Yes, 24 specified days.

Q. 24 specified days out of a calendar year? A. Yes, sir.

Q. All right, if you meet that requirement, do you receive compensation, financial compensation, for it? A. I receive financial compensation for the 24 days, yes.

Q. Does part at least of the 24 days requirement however include or involve flight time, that is, flying an aircraft? A. They generally would require flying, yes.

Q. So that in flying an aircraft you are accumulating time to the satisfaction of the 24 day requirement at any given time? A. My primary duty on those 24 days would not be to fly aircraft, but my primary duties would be to perform the duties of an aircraft maintenance officer. How-

ever, flying could and probably would be conducted in those 24 days.

413 Q. Well, let me go back. Possibly this is repetitious, due to the little break here. Do I understand that you said that in performing the flying activity you would be accumulating time toward the ultimate possible satisfaction of the 24 day annual requirement? A. That is not correct.

Q. Well, will you restate it and make it correct for me. I may not have it quite right. Please set it straight for me, if you will be so kind. A. I said that during these 24 days my primary duty would not be to fly an airplane necessarily but could conceivably be part of the program. My primary duty would be as an aircraft maintenance officer.

Q. Well, would your duties as aircraft maintenance officer, or aircraft maintenance chief rather, I believe, which is the correct title according to the orders which are before us as United States Exhibit No. 3, would the duties of that position require you to perform training flights? A. As an aircraft maintenance chief?

Q. That's right. A. That is not my job description

414 on these 24 days that I have reference to.

Q. In other words, the flying the aircraft relates to the 24-day requirement of the Air Force Regulations, is not part of your job description as an aircraft maintenance chief? A. That is not true.

Q. Well, what is true? A. Flying an aircraft is part of my requirement to satisfy the Department of the Air Force, since they have given me the rating and require that I make frequent and regular aircraft flights and satisfy certain minimums as outlined in Air Force Regulation 60-2 and other manuals; has nothing to do with job description.

Q. It has nothing to do with your job, or the description of the job, or the duties of the job of aircraft maintenance chief? A. That is correct.

Q. All right. We have referred to these flights which you made from time to time for training purposes. Are these

sometimes called proficiency flights, or proficiency
415 training flights? A. They are.

Q. Would that be a proper way to refer to them? I mean is that the correct way to refer to them, according to usual terminology? In other words, what are they commonly called? A. I think proficiency is the general accepted broad term for the flights.

Q. All right. Now, in addition to proficiency flights of this nature did you make any other kinds of flights at any time? A. I did.

Q. How would you describe those flights? A. I have made flight check flights on the aircraft and equipment, in which there is an element of proficiency gained.

Q. What do you mean by a flight check flight? What is the specific purpose of a flight of that nature? A. I was qualified to evaluate the condition of an aircraft after, for instance, certain maintenance had been performed; to be a flight check of the equipment that was—it would be a flight check of the equipment.

416 Q. That would be a different kind of a flight from a proficiency flight then? A. Proficiency would be attained in that flight as well as in the other flight, or maintained.

Q. Yes, I suppose one could say any kind of a flight you make for any purpose would in that respect be a proficiency flight, would it not? A. I would think so, yes.

Q. But I am not referring to that aspect of it. This would be a flight made for a purpose specifically other than proficiency. The proficiency, in other words, would be only incidental, is that correct? A. Possibly.

Q. Well, excuse me now, Captain McCoy. I don't like the answer "possibly" because it is either yes or no. Could you say one or the other for me? A. I think I stated a moment ago that proficiency is the broad term that is applied to flights, since, as you have stated, an element of proficiency is gained from all flights. Now, I will not dif-

ferentiate between one type flight and say it is a pro-
417 ficiency and the other type is not a proficiency flight.

Q. No, I realize that and that is not what I asked you. The question is this: The specific, immediate purpose of a check flight is not your proficiency, if you make it to determine mechanical condition of the aircraft, is that right? A. That is correct.

Q. All right. Did your employment as aircraft maintenance chief involve a requirement that you make from time to time check flights, that is check flights or maintenance operational checks? A. There is no requirement to my knowledge in the job description of an aircraft maintenance chief that he be a rated pilot and be required to make flight checks or other checks on the equipment.

Q. Now turning specifically to the day of May 20, 1958——

Mr. Wolcott: Could you excuse me a minute. Could you read the last question and answer back?

(Question and answer read by Reporter.)

Mr. Wolcott: Before you ask the next question
418 I'd like to move to strike out the answer as not responsive.

The Witness: I would be happy to make an addition to the answer if it will help.

Mr. Wolcott: Go ahead. Make an addition.

The Witness: To further answer Mr. Pettibone's question let me say that——

Mr. Pettibone: Well, now hold it just one moment, please, Captain McCoy, before you proceed.

Mr. Wolcott: He has a right to complete it.

Mr. Pettibone: I didn't say he didn't. I just asked for a moment's pause.

Mr. Wolcott: Okay. I'm sorry.

Mr. Pettibone: Well, you have something further you want to say, Captain McCoy?

The Witness: Yes, as an addition to the answer to your question, since I was in the capacity of aircraft maintenance officer for the 104th Fighter Squadron——

Mr. Pettibone: Excuse me. You mean as aircraft maintenance officer you are referring to your capacity at that time as a Captain——

The Witness: That's right.

419 Mr. Pettibone: —in the Air National Guard, as distinguished from your employment as aircraft maintenance chief. Is that what you mean?

The Witness: That is correct.

Mr: Wolcott: No. I don't see what——

Mr. Pettibone: Well, he said officer, Mr. Wolcott, and the term here is "chief".

Mr. Wolcott: I understand then he has three jobs. His job as an Air National Guard Captain is one. Then the other job is aircraft maintenance chief.

Mr. Pettibone: That's right, two jobs.

Mr. Wolcott: But you are making a third one, aircraft maintenance officer.

Mr. Pettibone: He used the term "officer". Let the Reporter read it back.

Mr. Wolcott: Maybe he used it, but I am trying to get it straight.

The Witness: In my capacity as a Captain in the Air National Guard, with the job description of an aircraft maintenance officer and being qualified to perform flight checks on equ pment, and as I stated before there is

420 no requirement in the aircraft maintenance chief job description to make these flights, but since I was there full time and had this dual responsibility then again with an eye for safety in the best operating equipment I felt that it was necessary that these flights be accomplished and in the absence of the base maintenance supervisor, who would normally make these flights, I did so. I accomplished them.

Q. (By Mr. Pettibone) Well, I gather what you mean is what you are saying is that you, in a dual capacity——

Mr. Wolcott: I object to your summation, Mr. Pettibone.

Mr. Pettibone: I am asking a question.

Q. (By Mr. Pettibone) You had a dual capacity?

Mr. Wolcott: I think he has already answered and I think you should put a question, not summarize.

Mr. Pettibone: I am putting a question.

Q. (By Mr. Pettibone) You were in a dual capacity, is that right? A. I had two job descriptions, yes.

Q. Now, in one job description you were an Air
421 National Guard Captain, is that correct? A. It is my understanding that I was an Air National Guard Captain all the time.

Q. Yes, I realize that all the time in one capacity you were an Air National Guard Captain. In the other capacity you were an aircraft maintenance chief? A. I was an Air National Guard Captain and aircraft maintenance chief.

Q. Now, in the first capacity could you make maintenance, operating check flights? A. In the first capacity, yes.

Q. In the other capacity was that part of your job? Could you make them? A. I could make them, yes.

Q. Was it part of your job to make them in that capacity? A. I was still a Captain in the Air National Guard and——

Q. That is what we talked about first. Now I am talking about the other capacity.

Mr. Wolcott: Wait a minute. I think you have gotten
422 it all the way around. I thought first was the aircraft maintenance chief. Is that the way you understood it, Captain, first capacity?

The Witness: Well, let me answer.

Mr. Mudd: Just a minute.

Mr. Pettibone: Please, Mr. Wolcott, will you let me finish my questions and then object to them?

Mr. Mudd: Captain, answer the questions that are put to you.

The Witness: Well, I want to clarify this first and second capacity that has been brought up.

Mr. Mudd: It has been gone over. Mr. Pettibone has a question. Hear the question and then see what it is. Let's have the question.

Q. (By Mr. Pettibone) Now in hopes we can keep this clear between us, Captain, I will start again all over. In one capacity you were a Captain in the Air National Guard and were in that capacity acting as aircraft maintenance officer? A. That's correct.

Q. In another capacity you were employed by the 104th Fighter Squadron as an aircraft maintenance chief?

423 Mr. Mudd: Object. I don't like the words "employed by the 104th." It is possibly misleadingly classified. It might be better——

Mr. Pettibone: I think your objection is well taken. Let me rephrase that question.

Q. (By Mr. Pettibone) You were also at the same time employed in the capacity of aircraft maintenance chief, is that correct? A. That's correct.

Q. Now did your status as aircraft maintenance officer, the duties of that assignment and position require you to make maintenance operational check flights of aircraft? A. As a rated pilot and being required to perform certain flights to satisfy the Department of the Air Force and having fulfilled the qualifications necessary to make me capable of performing operational checks on aircraft, then part of my duties I assume would be the responsibility for the aircraft and to test fly them or to flight check them.

Q. All right. Now, in the other capacity in which you were employed as aircraft maintenance chief were you either required or authorized in that capacity, dis-

424 tinguished from this other one, to make maintenance operational check flights of aircraft? A. I don't believe any aircraft maintenance chief, per se, is authorized to make aerial flights. The authorization comes from the Department of the Air Force.

Q. Now turn specifically to May 20, 1958. Do you remember what time you reported to work that morning?

Mr. Mudd: I am going to object again if we are getting into his minute by minute, hour by hour movements on May 20th inasmuch as it was gone into in extensive detail on the original. If you have some pertinent questions I

don't mind the question on that, but if we are going to take it from the beginning of the time he reported to work——

Mr. Pettibone: No, I didn't have that in mind. I don't want to take up the time myself either to go all over every little detail. I do have a few items that I hope I can get to properly and without any delay.

Mr. Mudd: All right.

Q. (By Mr. Pettibone) I would like to start off with the question which I just asked. Do you remember what time you came to work that morning May 20th?

425 A. Approximately 8 o'clock.

Q. Now, you had planned to make a proficiency training flight on that day previous to May 20th, had you not?

Mr. Wolcott: I object to leading the witness.

Mr. Pettibone: Well, how can I speed the thing up if I don't ask him leading questions, because it is already in here. He stated it.

Mr. Wolcott: That's all right, I say, but I think you ought to conduct it just by questions in proper form.

Q. (By Mr. Pettibone) When you came to work on May 20, 1958, did you have any plans to make a proficiency training flight that day? A. I did.

Q. When had you first made those plans? A. On the previous Saturday.

Q. Had you spoken to anyone about the plans? A. I had.

Q. To whom had you spoken? A. Colonel Kilkowski.

Q. What specifically had you said to him in that

426 connection? I mean summarize what you said to him in that connection.

Mr. Mudd: Objection. It is all repetition. It has been covered before.

Mr. Wolcott: I join in the objection.

Mr. Pettibone: Well, obviously between Mr. Wolcott and Mr. Mudd I wouldn't be able to ask any questions.

Mr. Mudd: That is not correct.

Mr. Pettibone: If I ask a leading question Mr. Wolcott objects. If I make a direct question Mr. Mudd objects.

Mr. Mudd: I think you have done pretty well.

Mr. Wolcott: That is the first time I interposed that kind of objection after three hours or so.

Mr. Pettibone: Well, I haven't equalled your time yet, Mr. Wolcott, in spite of the three hours.

Mr. Mudd: God forbid.

Mr. Wolcott: Well, it is there for you to shoot at.

Mr. Pettibone: Let's have a five minute break.

(Thereupon, there was a short recess taken.)

427 Q. (By Mr. Pettibone) Did you mention to Colonel Kilkowski on the Saturday preceding May 20, 1958 that you wanted to take a passenger with you on the plane? A. I believe that is in the record, Mr. Pettibone.

Mr. Mudd: Just a minute. And for the record I am going to object and instruct the witness not to answer any further questions dealing with May 20th inasmuch as it was covered extensively at the prior two sessions of the deposition and the copies of those depositions have been available to counsel for the Government for some two or three weeks at this time and now to go back and ask questions which have already been covered seems to me to be within the Federal Rule granting the witness protection from harassment.

Mr. Pettibone: Do you mean you object?

Mr. Wolcott: Well, I'd like to note that I disagree with Mr. Mudd here. I think the counsel of the Government has a perfect right to cross examine.

Mr. Pettibone: I just want to get one thing clear. Do you refer to any question I asked him about the events of May 20, 1958? That is what you said.

428 Mr. Mudd: No. I understood originally, Mr. Pettibone you had several specific points that you wanted cleared up or brought out. I have no objection to those, but to go back to items that have already been covered, to me seems burdensome and harassing the witness, which the witness should be protected from, I think. I also understood at the beginning of the deposition that counsel would attempt in an orderly fashion to let Mr. Galiher conduct

the original investigation and that there would be an attempt by counsel thereafter not to plow the same field and in my judgment this field has been well plowed in the last two Saturdays to which Captain McCoy submitted to deposition.

Mr. Wolcott: Well, I'd like to say in view of the remark of Mr. Mudd that I entirely disagree with him. I have gone over the record and I don't think the field, to use the colorful description supplied by Mr. Mudd has been—that the same furrow has been plowed twice. The field may have been better plowed, but not the furrow and I certainly don't object and I think Government counsel has the right to cross examine.

Mr. Mudd: See. Now, Mr. Wolcott is on your side,
429 Mr. Pettibone.

Mr. Wolcott: Well, I think he has a right——

Mr. Pettibone: Well, you will force me, if you instruct the witness not to answer the next question which I have, you will force me to terminate the proceeding, Mr. Mudd, so we can take the matter before the Court.

Mr. Mudd: It is all right.

Mr. Pettibone: Because I think you are denying my rights, the Government's rights, the United States' rights.

Mr. Mudd: That's all right.

Can I confer with my client for a moment?

Mr. Pettibone: Certainly. Go right ahead.

Mr. Mudd: Captain McCoy says he thought you were under the impression that I had said "any question." I didn't mean to imply any question. I accepted your suggestion earlier that you had a few points you wished to bring up and if they are new points or unclear points or additional points I, of course, have no objection to them but I do object to covering the same material that has already been covered, and if you'd care to discuss with me in private or in public the general areas that you wish
430 to inquire into perhaps it can be worked out.

Mr. Pettibone: Well, I am endeavoring to the

Q. (By Mr. Wolcott) Will you answer that, please? A. I believe that all of the CARs are included in Air Force Regulations 66-D as they apply.

Q. Yes. Now, what manuals were used by you in connection with the operation and maintenance of T-33 type aircraft? A. Operation Technical Order T-33-A-1, which is the operation manual, or aircraft operation manual technical order.

Q. Does that also include maintenance, or is that the general operation? A. No, maintenance; the general maintenance manual would be IT-33-A-2, and it shreds out for all types of maintenance.

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217 Q. Captain, who is the Air Force liaison officer
218 stationed at the base? A. Major Britton.

Q. Can you give me his full name? A. Milton D. Britton.

Q. Are there any other Air Force personnel stationed at the base? A. There are.

Q. Could you tell us who they are, please? A. I am not positive of the names.

Q. As best you can and also while you are at it just give us their function, please. A. I can't be positive. There is Sergeant Baldwin, Sergeant Storm, and one whose name escapes me at this moment.

Q. What are the functions of these sergeants? A. These people are to assist Major Britton in advisory services in the maintenance area, the administration area, and weather flight.

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219 Q. Is there a manual, or are there manuals used in connection with that function? A. We are governed by manuals and regulations that also govern Major Britton and assist him.

Q. Are these manuals Air Force manuals? A. They are.

Q. Issued by the United States Government? A. That's right.

220 Q. Can you recall any? A. Air Force Regulation 60-16 is the governing regulation and it is accompanied by manuals that are—manual the details.

223 Q. (By Mr. Wolcott) Did Major Britton have an office there at Martin? A. He did.

Q. How was that designated? A. The physical identification of the office I believe is Air Advisor's Office.

Q. And is there a United States Air Force plate, insignia, or sign there? A. Not to my knowledge. No.

Q. Is that located in proximity to other officer personnel at the Air Force Base? A. It is.

Q. How close is that? Is that part of the same building? A. It is the next office; adjoining offices.

224 Q. Next office to whom? A. To the squadron commander and the base detachment commander.

Q. Who is that? A. Squadron commander is Major John F. R. Scott, Jr.; and the base detachment commander is Lieutenant Colonel Victor Kilkowski.

Q. Who is here and has been here throughout this proceeding, is that correct? A. That is correct. Colonel Kilkowski has been——

Q. Pardon me. A. Colonel Kilkowski has been here. Major Scott hasn't.

Q. That's right. Thank you.

Now, did Major Britton ever accompany anyone on flights? A. He has.

Q. Is that part of his regular procedures? A. I believe that part of his duties are to assist with the standardization of training and performance of the air group personnel.

225 Q. Did Major Britton also inspect the aircraft from time to time? A. As part of a pilot's normal

duties he would inspect the aircraft for its fitness before flight.

Q. Now you are referring to the time that he would be piloting a plane? A. That's right.

Q. Now, apart from that, would he inspect the squadron? A. Well, his office from time to time inspects aircraft and training.

Q. Thank you for the suggestion, Captain. So when I refer to Major Britton I will include his office. That is, his staff; the sergeants, I think that you mentioned. A. That's correct.

Q. They assist him in performing that function.

Well, just what do the sergeants do? A. They assist Major Britton in the performance of his duties through inspections and observations of the activities of the squadron.

Q. Is Major Britton and his staff there full time? A. Major Britton is regular Air Force, or he is full-
226 time Air Force.

Q. I see, and he is there all the time at Martin? A. He is there the normal workday, yes.

Q. And how many hours is that, and what are the times involved? A. That is five days a week, roughly eight hours a day.

Q. Is that weekdays? A. Tuesday through Saturday.

Q. Tuesday through Saturday. That also applies to the sergeants? A. That's correct.

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227 Q. What are the points of contact you have in the course of your duties at the Martin Air Force Base with Major Britton or his staff? A. The inspections that——

Mr. Pettibone: One moment, please, before the witness answers. I will object to the form of the question.

Mr. Wolcott: All right. Please answer it.

The Witness: The inspections that Sergeant Baldwin would complete are generally forwarded to the commander,

Major Scott, with Major Britton's signature, and then they are forwarded to me for action to comply with the discrepancy, or so forth, at the Martin Airport.

248 Q. (By Mr. Wolcott) Now, Captain, what do you
249 understand local flying area to mean? A. The local flying area, as I understand it, is as dictated by the commander through the operations officer.

Q. And is that a particular area to which you are physically limited in the operation of your aircraft?

Mr. Mudd: Objection.

The Witness: Shall I answer?

Mr. Mudd: Sure. Go ahead.

Mr. Wolcott: Yes. Go ahead. Answer.

The Witness: The only local flight clearance, VFR local flight clearance, the S.O.P. confines the operating—the operation of the aircraft to the local flying area, yes, sir.

Q. (By Mr. Wolcott) Well, now, on May 20th, 1958, were you limited to this local flight area? A. I was limited by S.O.P. with the type clearance I had to local flight area.

Q. The local flight area that we have just discussed, is that right? A: As near as I can determine, yes, sir.

Q. Now, in the performance of your duties as maintenance officer what uniform did you wear, Captain?
250 A. The uniform that I have on right now.

Q. Are there any other uniforms that you wear at the base other than what you have on now? Any other types of uniforms? A. Only the summer version of the same type of uniform.

Q. I see, and this is the same as completely identified by you last week? A. That is correct.

Q. So that whether you are performing flying duties or maintenance duties, or caretaker duties, or inspection duties, you always wear this uniform or the summer version thereof, is that right? A. Normally in the operation of an aircraft, you would not wear this uniform. Otherwise, yes.

Q. Now, in the operation of an aircraft you are talking about flight now? A. That's right.

Q. What uniform do you wear? A. You would wear the flight equipment, flight gear.

251 Q. Which consists of what? A. Flying suit, flying boots, gloves, helmet, parachute.

Q. Is that worn over your uniform? A. Not normally.

Q. You take your uniform off and put that on? A. That's correct.

Q. Now, what insignia does this flying gear have or markings? A. It is identified as property of the United States Air Force.

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255 Q. Yes. Now, on this particular occasion who conducted the pre-flight inspection? A. Maintenance personnel.

Q. Who is that? A. I believe that was Sergeant Nolan.

Q. Is there a record or form made of this pre-flight—— A. There is.

Q. And what is the form called, or how would you identify it? A. This inspection is recorded in one section

256 of the, again 781 form.

Q. Is Sergeant Nolan in the employ of the United States? A. Sergeant Nolan works as an air technician with the Maryland Air National Guard.

Q. And so far as you know is he paid by the United States? A. As far as I know his pay check is drawn on the Treasurer of the United States.

Q. Is he a full-time employee? A. He is a full-time employee.

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VOLUME II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1964

No. 345

MARYLAND, FOR THE USE OF NADINE Y. LEVIN, SYDNEY L. JOHNS, ET AL., PETITIONERS,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 8, 1964

CERTIORARI GRANTED OCTOBER 19, 1964

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Captain Julius R. McCoy

was recalled as a witness and having previously been duly sworn was examined and testified as follows:

Examination by Mr. Pettibone:

Mr. Pettibone: Will the Reporter mark this as United States Exhibit for identification No. 1.

(General Orders referred to marked U. S. Exhibit No. 1 for identification.)

Mr. Pettibone: Please hand United States Exhibit for identification No. 1 to the witness.

328 (Paper handed to witness.)

Q. (By Mr. Pettibone) Captain McCoy, will you look at United States Exhibit for identification No. 1.

Were you commissioned as a second lieutenant in the Maryland Air National Guard on 31 January 1952, with rank from January 25, 1952, pursuant to General Orders No. 9, issued by the State of Maryland Military Department, Fifth Regiment Armory, Baltimore, dated 31 January '52? A. This appears to be a General Order issued by the State of Maryland, appointing me as a second lieutenant in the Maryland Air National Guard, yes, sir, on the dates indicated.

Q. And that appointment was pursuant to General Order No. 9, an abstract part of which appears in United States Exhibit No. 1 for identification, is that correct? A. That is correct.

Q. Now, were you on March 31, 1952, by General Order No. 24, issued by the State of Maryland Military Department, Fifth Regiment Armory, Baltimore, Maryland, given Federal recognition as a second lieutenant in the Maryland Air National Guard, with date of rank from 25

329 January 1952? A. Again, a portion of the exhibit appears to be a reproduction of a General Order appointing me as a second lieutenant, with Federal recognition in the Maryland Air National Guard.

Q. And does the extract from General Order No. 24, which is shown in United States Exhibit No. 1 for identification, appear to be an extract copy of the orders so extending Federal recognition?

Mr. Mudd: Excuse me, Mr. Pettibone, but I did not hear the first part of your question.

Would you read back the question, Mr. McDonald?

(Question read by the Reporter.)

Mr. Wolcott: Excuse me, Mr. Pettibone, am I to understand from your remarks that these are not complete copies of orders but merely extracts?

Mr. Pettibone: It is an extract of the part of the order which pertains to Second Lieutenant Julius R. McCoy.

Mr. Wolcott: Well, couldn't you, Mr. Pettibone, for my enlightenment, tell me just what has been left out of the Order?

330 Mr. Pettibone: Nothing that pertains to Captain McCoy. Nothing that pertains to him. The orders that we have been speaking of list a number of individuals, but the other individuals, of course, are of no interest to us in this proceeding.

Mr. Wolcott: I see. Then, insofar as Captain McCoy is concerned, the order is complete.

Mr. Pettibone: That is correct. That is correct.

Mr. Wolcott: Thank you.

May I ask you this, Mr. Pettibone?

Should I find it necessary, would you have any objection to furnishing me with the complete order?

Mr. Pettibone: No, I would be happy to.

Mr. Wolcott: Thank you.

Mr. Pettibone: If you will give me a reasonable time to obtain it.

Mr. Wolcott: Certainly.

Mr. Pettibone: I think it is perhaps in the files of the State of Maryland and in the files of the United States Air Force, so unless we happen to have a full copy, I would have to request it from the State.

Mr. Wolcott: Yes.

331 Mr. Pettibone: I will be glad to get it for you.

Mr. Wolcott: Well, I suppose that applies to all orders that you refer to.

Mr. Pettibone: Yes, sir, that is true.

Mr. Wolcott: Thank you.

The Witness: The answer to your last question is it is correct.

Q. (By Mr. Pettibone) And were you by General Order No. 9, dated 31 January 1952, issued by order of the Governor, State of Maryland Military Department, Fifth Regiment Armory, Baltimore, Maryland, assigned to the 104th Fighter Squadron as a pilot? A. The extract named appears to be a reproduction of a General Order so appointing me.

Q. You are referring to the part of General Order No. 9 which appears in the United States Exhibit for identification No. 1, is that correct? A. That is correct.

Q. Were you subsequently promoted to the rank of First Lieutenant in the Maryland Air National Guard? A. That is correct.

332 Q. Do you remember the date when you were so promoted? A. I think it was in October 1952.

Q. Was that also pursuant to orders issued by the Governor of the State of Maryland, General Orders of the State of Maryland Military Department? A. I assume so.

Mr. Wolcott: We are going to object to that as to form. It calls for a conclusion, and the document speaks for itself.

Q. (By Mr. Pettibone) Now, were you subsequently after that promoted to the rank of Captain in the Maryland Air National Guard? A. That is correct.

Q. Do you remember the date when you were so promoted? A. 1 July 1956.

Q. By whose orders were you so appointed? A. United States Exhibit No. 1 contains an extract from a General Order No. 47, issued by the Military Department, State of

Maryland, that would indicate I was Federally recognized as a Captain on 1 July '56.

Mr. Wolcott: I move that the answer be stricken
333 as not responsive, as it referred to a document that the witness has not stated that he needed to refresh his recollection.

Q. (By Mr. Pettibone) After your promotion to the rank of Captain in the Maryland Air National Guard did you receive Federal recognition in that capacity? A. That is correct.

Q. Was that by General Order No. 7, dated 5 August '56, issued by the Military Department of the State of Maryland, Office of the Adjutant General, Fifth Regiment Armory, Baltimore, Maryland, an extract copy of which appears in United States Exhibit for identification No. 1.

Mr. Wolcott: Objection as to form, calling for a conclusion.

Mr. Mudd: What order was that?

Mr. Wolcott: And the document speaks for itself.

Mr. Pettibone: General Order 47, Roman Numeral III, the first one on this page.

Mr. Mudd: I thought you said 7.

Mr. Pettibone: 47.

The Witness: Again, U. S. Exhibit No. 1 contains
334 what appears to be a reproduction of a General Order granting me Federal recognition as of 1 July '56.

Q. (By Mr. Pettibone) Do you at the present time hold a commission as a Captain in the Air National Guard of the State of Maryland? A. That is correct.

Q. Did you hold such a commission as Captain in the Air National Guard of the State of Maryland at all times to May 20, 1958? A. That is correct.

Q. Do you hold any other commissions at the present time in the United States Air Force? A. I am not positive of the total procedure. This is very possible. I cannot be positive.

Q. Well, have you ever received any orders appointing

you as an officer in the United States Air Force as distinguished from the Air National Guard of the State of Maryland? A. To my knowledge, all of the orders that commission me in the Air National Guard include Federal recognition as part of the commission.

335 Q. Yes, but that is not my question. My question was this: Have you ever received any orders appointing you as a commissioned officer in the United States Air Force as distinguished from the Air National Guard of the State of Maryland? A. I can say this, that all of the orders to my knowledge include the symbol AF, which to the best of my ability would be to represent Air Force.

Q. Have you ever received any order appointing you as a commissioned officer of any grade, issued by any Headquarters other than the State of Maryland Military Department? A. Not to my knowledge.

Mr. Mudd: May I raise a point of inquiry, Mr. Pettibone? And possibly Captain McCoy may not understand the import of your question.

Are you referring, for instance, to wartime duty, where I believe the witness earlier described this service during the war.

Mr. Pettibone: Well, I am glad you raised the point.

336 Q. (By Mr. Pettibone) I mean, Captain McCoy, to confine the period of time involved in my question to let us say subsequent to January 25, 1952, at which time you were appointed a second lieutenant in the Maryland Air National Guard, as you have already stated, so that I am not referring to any time prior to that. A. I understand.

Q. As a matter of fact, then, prior to January 25, 1952 were you ever commissioned as an officer—let me change my wording there, so that you will understand my question better, perhaps.

Were any orders ever issued by any Headquarters other than the State of Maryland Military Department commis-

sioning you as an officer in the United States Air Force, or the Army Air Force, or the National Guard, either of the Army or the Air Force? A. I was commissioned in the Army Air Corps on 4 August 1944, and I believe in 1946 in the Army National Guard of West Virginia.

Q. And were you discharged from active duty under your Army commission in 1944 which you just referred to?

A. I was separated from active service in late 1945.

337 Q. Was that by General Orders issued by some military headquarters? A. That is correct.

Q. Do you happen to remember which headquarters issued those orders? A. I assume the Army Air Corps.

Q. And after that you were commissioned again in the National Guard of the State of West Virginia? A. I was commissioned in the Officers Reserve Corps subsequent to my separation from service, active service, Army Air Corps, in, I believe December 1945, and then later commissioned in the Army Guard, Army National Guard of West Virginia.

Q. That is the National Guard of the State of West Virginia you are referring to? A. That is correct.

Q. In the Air National Guard? A. Army.

Q. Yes. Referring to your Reserve commission which you mentioned, which you obtained in 1945, was that? A. I believe December '45, yes, sir.

338 Q. Were you discharged from that or released from it at any time subsequent thereto? A. I am not sure of the proceedings. I was commissioned without break in service to the West Virginia National Guard.

Q. Well, did you receive any orders at any time from any Headquarters relating to your status with respect to this Reserve commission which you just described? A. I would assume so.

Q. Do you have any recollection of what those orders provided? A. I do not.

Mr. Wolcott: Don't you have the records there, Mr. Pettibone?

Mr. Pettibone: No, Mr. Wolcott. These are State records, not Federal records.

Mr. Wolcott: I see.

Mr. Pettibone: And that is why I don't have it.

Mr. Wolcott: I thought you might have the Federal records on his reserve status.

Mr. Pettibone: We may have.

339 Mr. Wolcott: All right.

Mr. Pettibone: I don't know. I really did not mean to go into this service here.

Mr. Wolcott: That is all right. I thought if you had the records of that, that would help to clarify it.

Mr. Pettibone: Let us pause momentarily for a conference?

Mr. Wolcott: Surely.

Mr. Pettibone: Off the record.

(Discussion off the record.)

Q. (By Mr. Pettibone) Now, you testified previously, I believe, Captain McCopy, that you attended certain training schools, both prior to your appointment as a second lieutenant in the Maryland Air National Guard, and also subsequent thereto, is that correct? A. That is correct.

Q. And particularly you mentioned that you spent several months pursuing courses of training at Chanute Air Force Base in Illinois, is that correct? A. That is correct.

Mr. Mudd: Mr. Pettibone, may I make another

340 point of inquiry regarding your Exhibit No. 1 for identification, sir.

Mr. Pettibone: Yes.

Mr. Mudd: On the bottom of the first page is the inscription, "SPECIAL HANDLING REQUIRED" IAW, paragraphs 49(a) and 52, AFR 62-14.

Mr. Pettibone: Well, that should have been crossed out, but inadvertently the photostat was made before it was crossed out.

May I request the Reporter to draw a line through that at the bottom of U. S. Exhibit No. 1?

Mr. Mudd: No, I would object to that, the point of my inquiry being, of course, that inasmuch as the apparent handling of this is in accordance with an Air Force regulation, that I would assume that any responsibility for the use of this in a public proceeding would be yours and not that of the witness.

Mr. Pettibone: That is correct. I will assume on behalf of the United States full responsibility for introducing this at this time. And no responsibility is chargeable to Captain McCoy on that account.

341 Mr. Mudd: I further note that the photostat indicates that this is a certified true copy, which was made by Captain Millard F. Hamblin, Jr., of the U. S. Air Force, who apparently at that time was Recorder of the Aircraft Accident Board.

Mr. Pettibone: Well, that is a capacity which gave him the legal power or authority under the applicable Air Force regulations to make certifications of this type.

It has nothing to do with his other duties as an Aircraft Accident Board Recorder. It just merely indicates the position he held, which under regulation gives him a certifying power.

Mr. Wolcott: Well, I join in the objection Mr. Mudd made for the record.

You have offered a certified copy, which I assume is a complete one. And if any explanations are to be offered, I understand you mean you have given them, but as far as making a physical mark on the exhibit, I would definitely object to it.

Mr. Pettibone: You mean you object to offering a certified copy?

342 Mr. Wolcott: No, I have no objection to it. I am talking about making any change in the exhibit.

Mr. Pettibone: Well, I do not propose to make any change in the exhibit in any way. No, I do not propose to

make any change in it. My remarks are merely directed to the words "SPECIAL HANDLING REQUIRED," and the other little notation right under it at the bottom of the page, but I do not propose to do more than comment on them. I do not mean to change it.

Mr. Wolcott: Well, I was going to make the suggestion, Mr. Pettibone, that if you wanted to make an explanation of that remark at the bottom, then your explanation would be made in the record, and I think that would clarify it.

Mr. Pettibone: All right.

Well, apparently the words "SPECIAL HANDLING REQUIRED" were put on there for some military reason, to comply with some Air Force regulation or military requirement, the nature of which is really unknown to me.

Mr. Wolcott: Yes.

Mr. Pettibone: I am sure it does not have any
343 relationship to our use of the document here for our purposes. Certainly there is nothing classified or confidential and that is not public information contained in the document. And so I am not just sure how it got there or why. I am sure it has nothing to do with our purposes here.

Mr. Wolcott: Well, we will assume that.

Mr. Pettibone: Yes.

Off the record, Mr. Reporter.

(Discussion off the record, after which testimony was read.)

Mr. Pettibone: All right, will the Reporter mark as United States Exhibit No. 2 for identification this document?

(Special Orders referred to marked U.S. Exhibit No. 2 for identification.)

Mr. Pettibone: Would you please hand U. S. Exhibit No. 2 to the witness?

(Paper handed to the witness.)

Q. (By Mr. Pettibone) Captain, will you examine U.S. Exhibit No. 2 for identification?

(Paper examined by witness.)

344 Q. Is United States Exhibit No. 2 for identification a copy of the orders which you received, which caused you to go to the Chanute Air Force Base, Illinois, to pursue a course of training and instruction which you described earlier in your testimony in this proceeding?

Mr. Mudd: If you remember.

Q. (By Mr. Pettibone) That is right, if you remember.

Mr. Mudd: I think you are testing the recollection of the witness.

Mr. Pettibone: Yes.

Q. (By Mr. Pettibone) I don't mean to call upon you to state more than you can remember, of course. A. U. S. Exhibit No. 2 appears to be a reproduction of Special Order No. 182, that authorized me to proceed to the Chanute Air Force Base for the reasons stated, yes.

Q. And did you pursuant to this Special Order No. 182, issued by the Military Department of the State of Maryland, proceed to Chanute Air Force Base, Illinois, on or about 18 September 1955?

Mr. Mudd: Objection. I object to the conclusion of counsel in the framing of the question.

345 Mr. Pettibone: What conclusion, may I ask, Mr. Mudd? I asked him if he proceeded pursuant to those orders.

Mr. Mudd: You said pursuant to the State of Maryland National Guard Bureau, and there are words there indicating it is by authority of the Secretary of the Air Force, in a communication from the Chief of the National Guard Bureau.

Mr. Pettibone: That is true, but at the top of the exhibit it states, "Military Department, State of Maryland, Office of the Adjutant General, Fifth Regiment Armory, Baltimore, Special Order No. 182" and then follows the text of the order which says, "By order of the Governor, Milton A. Reckord, Major General, the Adjutant General."

That is why I refer to it as an order of the Air National Guard of the State of Maryland.

Mr. Mudd: Well, I think it is obvious then, from the reading of the document, and even the prior Exhibit No. 1 for identification, that these orders have been cut from orders received from other authorities and issued to Captain McCoy.

346 Mr. Pettibone: Oh, I agree. I think the document will speak for itself in that respect. But I still feel my characterization as I framed it in my question is proper.

Mr. Wolcott: Well, I join in the objection that Mr. Mudd just noted. I think it is improper for you to make your own characterization of an order that speaks for itself.

Mr. Pettibone: All right, I will withdraw the question in that manner in which I framed it before, and I will put it to the witness in the following manner:

Q. (By Mr. Pettibone) Captain McCoy, did you pursuant to the orders contained in United States Exhibit No. 2 proceed, on or about September 18, 1955, to Chanute Air Force Base, Illinois? A. I did.

Q. And while at Chanute Air Force Base, Illinois, pursuant to these orders, did you pursue a course of training to students in maintenance, known as or described as aircraft maintenance officers course? A. I did.

Q. And on the completion of that course where
347 did you go? A. I returned to Baltimore.

Q. Did you report to the Air National Guard of the State of Maryland upon your return? A. I did.

Q. Were you assigned to duty in the Air National Guard of the State of Maryland upon your return? A. That is correct.

Q. What duties were you assigned at that time? A. Aircraft maintenance officer.

Q. With what unit? A. With the 104th Fighter Squadron.

Mr. Pettibone: This is off the record.

(Discussion off the record.)

Q. (By Mr. Pettibone) Now, after you were commissioned a second lieutenant in the Maryland Air National Guard in 1952, you stated previously that from time to time you attended training courses at training schools particularly a two weeks' period during the summer, is that correct? A. That is correct.

Q. Did you attend those training schools pursuant
348 to orders issued by some military headquarters? A. I am not familiar with the procedures necessary to direct me to this training.

Q. Well, isn't it true that when an officer such as yourself attends a training school normally written orders are cut by some Headquarters directing you to proceed to the school and take the course? A. That is the normal procedure, yes.

Q. And do you recollect whether or not such orders were cut covering your attendance at the training schools that you mentioned in your testimony? A. I assume they were, yes.

Q. Well, do you remember that they were cut? A. I don't truly remember that they were.

Q. Well, when you attended the training schools, isn't it the practice upon arrival to report to someone in pursuance to your orders? A. Are you referring now to the two weeks' summer training? Q. That is correct, yes. You testified that you went different places different sum-
349 mers to take training courses. A. That is correct.

Q. You recollect that? That is correct? A. That is correct.

Q. Now, when you went to those places which you have previously testified to, upon arrival at the training school or training center, did you report your arrival to anyone? A. I accompanied the entire 104th Fighter Squadron to those training sites.

Q. And do you have a recollection as to whether or not you presented any orders pertaining to you upon arrival

at any one of those training schools or centers? A. Not to my recollection.

Q. Well, do you recollect whether or not any orders on your behalf, covering perhaps the whole group of which you were a member, were so presented to anyone? A. I have no knowledge of it.

Q. Do you remember ever seeing any such orders? A. I have no recollection of seeing them.

Mr. Pettibone: Off the record.

(Discussion off the record.)

Q. (By Mr. Pettibone) Now, Captain McCoy, you
350 have also testified that during your period of service as a commissioned officer in the Air National Guard of the State of Maryland, that there were certain training requirements which you had to comply with, and also that there were various training schedules from time to time which you outlined the training that you and other commissioned officers in the unit would comply with. Do you recollect by whose authority those training schedules were issued to you and other members of your unit, or what Headquarters prepared and issued them, or by whose authority they were signed or made official? A. Is this the physical schedules of the training assemblies or the training required to be accomplished?

Q. Well, I have in mind both really, but separate the two items in your answer if you wish. A. To the best of my belief, the local Commander established the dates of the training assemblies.

Q. By the local Commander, do you mean the local Commander of your specific unit? In this case that would be Colonel Kilkowski? A. I believe at this time Major Scott.

351 Q. At this time Major Scott, but formerly Colonel Kilkowski? A. Formerly Colonel Kilkowski.

Q. And were those training schedules prepared on a written form and published, or maybe put up on the bulletin

board, or something like that? A. They were prepared in advance of the training assemblies, yes.

Q. About how long a period would be covered usually by training schedules of this type? A. I believe they are published for a six months period.

Q. Would the training schedule call for meetings or assemblies of members, of the commissioned officers, members of the unit? A. They would require the entire membership of the unit, both enlisted and commissioned, to perform their particular functions.

Q. About how often would the meetings take place? A. Roughly twice a month.

Q. Did you ever see any training schedules of this
352 type that were issued by anyone other than your unit commander? A. Not to my knowledge.

Q. Now, you testified previously that there was, in addition to the other National Guard Officers assigned to your unit, there was also a liaison officer, I think was the term used, usually an officer of the United States Air Force, is that correct? A. I believe his job description in this particular location is Air Advisor.

Q. I see. You had one commissioned officer then who was a commissioned officer in the United States Air Force, who was attached to your unit as an Air Advisor, filling this position, is that correct? A. That is correct.

Q. At the time of your commission and assignment to this unit, to the 104th Fighter Squadron, in 1952 until May 20, 1958, can you remember the names of the various officers who held this position of Air Advisor? And give the date approximately of each one, when they were in the unit, and I realize that this calls upon your memory and you may not be exact, but I don't mean to be
353 exact, but just approximately as you can recollect. A. In 1952?

Q. Yes. A. When I joined the unit, Lieutenant Colonel Van Ausdell—V-a-n A-u-s-d-e-l-l—and I believe in 1953

Lieutenant Colonel Dow—D-o-w—and I believe again in 1957 he was replaced by Major Britton—B-r-i-t-t-o-n.

Mr. Wolcott: What was his full name?

The Witness: Major Britton?

Mr. Wolcott: Yes.

The Witness: Milton D. Britton.

Q. (By Mr. Pettibone) Now, as a military officer yourself, you are familiar, I assume, with the expression commonly used in the Air Force and the Air National Guard and other military installations, called command authority, is that correct? A. I am, yes.

Q. Would any of these officers whom you have just named, who were attached to your unit as Air Advisor, in your opinion have command authority at any time over you as a commissioned officer in that unit?

354 Mr. Mudd: Just a minute. Objection. The question calls for a conclusion of law——

Mr. Pettibone: It calls for his opinion.

Mr. Mudd: —by the witness, or, as the question said, his opinion. I therefore object to it.

I do not instruct this witness not to answer, however.

Mr. Wolcott: Well, I want to join in the objection, and on the further ground that the witness has not stated what he understands the term command authority to be, and I think he should be first asked that in any event.

Mr. Pettibone: I think your point is well taken, Mr. Wolcott, very well taken.

Q. (By Mr. Pettibone) Captain McCoy, what is your understanding of the meaning of the term command responsibility in the military establishment?

Mr. Wolcott: Did you say authority or responsibility? Are you using the term command responsibility or command authority?

Mr. Pettibone: Command authority. Command authority. If I said responsibility, Mr. Reporter,

355 please correct my statement. It should be command authority.

Q. (By Mr. Pettibone) Could you tell us what that means, Captain McCoy? A. There are established command lines in my opinion that emanate from the president right on down, right through the lowest officer, in a chain or in an organization of a particular type.

Mr. Wolcott: You are talking about the President of the United States?

The Witness: That is correct, sir.

Mr. Wolcott: Yes.

Well, I still don't understand what is meant by it.

Mr. Mudd: Well, perhaps not what the witness has said what he understands by it.

Mr. Wolcott: Well, okay. It certainly left me in the dark.

Mr. Pettibone: I will be glad to furnish you with the Air Force publication, if there is one, I don't know that there is one.

Mr. Wolcott: Does that mean a chain of command,
356 may I ask?

Mr. Pettibone: Is this off the record now?

Mr. Wolcott: Yes.

(Discussion off the record.)

Q. (By Mr. Pettibone) Captain McCoy, did you ever individually receive any direct orders from any of the officers whom you have just mentioned, who filled the position of Air Advisor with your unit? A. None other than to respect the rank and the military position of a superior, to my knowledge.

Q. Now, you have testified previously in this proceeding that part of your duties with the 104th Fighter Squadron was to perform what you called check-outs on planes and instruments assigned to the unit.

What is embraced in the term check-out as you used it in that connection? A. The term I believe was flight check.

Q. All right. A. I might be corrected on that.

Q. All right. A. And the objective was to evalu-
357 ate the equipment for its fitness for flight or for its air readiness in the case of instruments or radio

equipment and to monitor the quality of maintenance performed at the installation.

Q. Did that sometimes involve your actually flying the equipment? A. It did.

Q. As pilot? A. That is correct.

Q. Now, when you performed such duties involving the flying of equipment for this purpose, was that done pursuant to someone's orders, some superior's orders? A. It is desirable that an aircraft maintenance officer be able to perform this duty, and I believe that can be found in the appropriate manuals.

Q. Yes, I realize that, but when you actually did perform the duty, was it performed pursuant to orders of anyone? A. In all cases flight orders were issued to perform these duties.

Q. Yes, and by whose authority, or in whose name
358 were the flight orders in those instances issued? A. The authority to operate the aircraft was issued by the Department of Air Force.

Q. I am referring now to flight orders to make a specific flight for the purpose which you have just described. Were those orders issued by the Department of Air Force? A. I assume the overall authority to operate the aircraft——

Q. No, I am not referring to that, but——

Mr. Wolcott: Please let the witness answer. You are interrupting the witness.

Mr. Pettibone: All right. I did not wish to interrupt him.

Mr. Wolcott: Now, clear up his answer. Let him finish his answer.

Q. (By Mr. Pettibone) Go ahead, state your answer. A. And in that connection, authority specifically delegated to the local Commander, who in turn issued the specific order to perform a specific flight.

Q. All right, now, we are referring——

Mr. Wolcott: Would you read that answer back? It does not sound very complete.

359 (Answer read by Reporter.)

Q. (By Mr. Pettibone) Where the specific orders for the specific flight——

Mr. Mudd: I think we would all agree that there was some part of his statement or answer that was t out.

Mr. Wolcott: That is right, because he started to say by authority——

Mr. Mudd: It is my understanding that he said they originally came down from the Air Force and they went to the local Commander.

Mr. Wolcott: That is the part that was left out.

Mr. Mudd: I wonder if we could clarify that on the record, Mr. McDonald?

(Testimony read by the Reporter.)

Mr. Mudd: Do you wish to add anything? You said, "I assume the overall authority", and then there was an interruption by Mr. Pettibone, and if Mr. Pettibone has no objection to letting him give his full answer.

Mr. Pettibone: Yes, let us supply the missing part, and I think he will probably be able to supply that, and then take up the rest of that.

360 The Witness: With the interruptions that have been in there, I am losing words.

Can I just make the whole answer over again?

Mr. Mudd: Go ahead.

Mr. Pettibone: Go ahead.

Mr. Wolcott: Go ahead.

The Witness: I assume that the overall authority to operate the aircraft is issued by the Department of Air Force, and then authority is subsequently delegated to the local Commanders to issue orders for a specific flight.

Q. (By Mr. Pettibone) Were the specific orders for the specific flight that you have described issued in each in-

stance by the Commander of your local unit, that is, the 104th Fights Squadron? A. To the best of my ability.

Q. You mean to the best of your recollection? A. To the best of my belief. I don't recall it.

Q. Yes. Yes. That would in other words be the base detachment Commander of your unit, either Colonel Kilkowski or Major Britton, or Major Scott, excuse me. A. I
361 believe this would be the Squadron Commander rather than the base detachment Commander.

Q. I see. And who would that be? Can you recollect the name of the Squadron Commander who issued those orders? A. Any particular year or flight?

Q. Oh, let us take the year 1958? A. Colonel Kilkowski was Squadron Commander at that time. I assume he would issue the orders.

Q. Were the other officers, the other Squadron officers who would issue such orders, also commissioned officers in the Air National Guard, assigned to your unit? A. Yes, sir.

Mr. Mudd: Objection, on the ground of materiality.

Go ahead and answer the question if you know.

A. I assume that they are in the Air National Guard, yes, sir.

Q. (By Mr. Pettibone) Now, in your previous testimony you have mentioned the fact that you were from time to time given check flights to test your flying proficiency.

In general, what is the nature of such a flight, and in general how is it conducted, just briefly? A. Certain in-
362 dividuals are assigned the duty annually to check the proficiency of the pilots of the unit and the standardization between the pilots with the unit, and they are given a flight check, the pilots are given a flight check by these individuals.

Q. Well, exactly what does that involve? Does that involve making a flight in a plane accompanied by the person giving the test? A. That is correct.

Q. Did you actually make such flights for such test purposes? A. I did.

Q. Since the time of your commissioning in 1952, about how many such flights did you make for test purposes? A. I don't recall.

Q. Well, about how often do you make these flights? Is it once a year or more frequently or less frequently than that? A. I believe it is annually.

Q. Were the individuals who gave you these tests members of the unit to which you were assigned? A. Probably.

363 Q. That is to say, were they commissioned officers assigned to the same unit as yourself? A. To the best of my recollection, yes.

Q. Do you remember the names of any of them? A. I don't at this moment.

Q. Were you ever given a check, a test flight for such checking purposes, by anyone other than a member assigned to the same unit as yourself? A. In my original answer in this line of questions I referred to the standardization for proficiency flight check.

Q. Yes. A. To my knowledge, I can't recall any member other than a member assigned or attached to the 104th Fighter Squadron that performed such a check with me.

Q. Now, Captain McCoy, in addition to being commissioned officer, a flight officer, a pilot in the 104th Fighter Squadron, you were also a civilian employee of that unit, is that correct? A. I am not quite sure what status I was.

364 Q. Well, you testified before, if I remember correctly, you said you had a dual status: You were a commissioned officer in the Air National Guard, assigned to this unit, and we have just gone over the assignment, your assignment to this unit, and your service with it from 1952 to the present time. Now I am turning to something else. You were also in addition to being a commissioned officer, you were also a civilian employee for a particular purpose, which we will go into in a moment, in the unit, is that correct?

Mr. Mudd: Go ahead and answer it if you can.

A. I cannot answer this question truthfully. I am required to wear the uniform that I presently have on during my status as an Air Technician, and I cannot truthfully answer your question.

Q. (By Mr. Pettibone) Well, aren't you aware of the fact that you were and are a civilian employee of the 104th Fighter Squadron as well as being a commissioned officer in it? A. Again, I cannot be positive as to the status.

Mr. Pettibone: Will the Reporter mark this document as United States Exhibit No. 3 for identification?

(Special Orders referred to marked U. S. Exhibit 3 for identification.)

365 Mr. Pettibone: I would like to ask the witness to look at Exhibit No. 3 for identification.

(Paper handed to and examined by witness.)

Mr. Wolcott: May I ask you on the record, Mr. Pettibone, what PAC means?

Mr. Mudd: Similar to authority contained in——

Mr. Wolcott: What does ANGR mean?

Mr. Mudd: National Guard Regulations.

Mr. Pettibone: In case you have any question as to the extract, the part excluded does not pertain to the witness or having anything to do with this matter that we are dealing with here.

Mr. Wolcott: Yes.

Mr. Pettibone: But I will be glad to give you the whole order.

Mr. Wolcott: Well, I assume the same comment applies to all of these.

Mr. Pettibone: Yes, that is right.

Mr. Wolcott: May I ask you on the record, Mr. Pettibone, what assistant U. S. P. & F. O. means?

Mr. Pettibone: It is an abbreviation for United
366 States Property & Fiscal Officer.

Mr. Wolcott: I see.

Mr. Pettibone: As I am informed by competent Air Force authority.

Mr. Mudd: And put that in capitals, Mr. McDonald. Let the record show he is referring to Major Prince.

Q. (By Mr. Pettibone) Captain McCoy, referring to United States Exhibit No. 3 for identification, have you seen this document before at any time? I don't mean this specific one. I mean the original of which this is a copy or another copy of it. A. I have.

Q. In the second line of United States Exhibit No. 3 you will see the term, "Air National Guard Civilian Personnel Program". Do you know what that means or what it refers to? A. I assume that it has reference to some portion of the Air National Guard Regulation 40-01.

Q. Do you know whether or not it provides a program or procedure for the employment of civilian personnel by the National Guard?

Mr. Mudd: Objected to.

367 Mr. Wolcott: All right, objected to.

Are you referring to the personal knowledge of the witness?

Mr. Pettibone: Yes, I am asking him whether he knows.

Mr. Kieffer: Just a minute. For the record I would like to have it stated, although formal objections are waived, I wish to concur in all objections previously made and subsequently made that I did not individually object to.

And that goes on behalf of Mr. Galiher and his clients, and Mr. Davidson and his clients.

Mr. Pettibone: Well, I am sorry, Mr. Kieffer, but I could not agree to let a statement of that kind pass without comment.

If you have an objection on form, in accordance with our procedure here, you will have to make your objection, the same as the rest of us have. I could not agree to any other procedure.

Mr. Kieffer: Well, I believe this is a general discovery deposition, and under the Rules, of course, no objections are waived at the trial.

368 Do you prefer from now on that I concur in all objections made with Mr. Wolcott?

Mr. Pettibone: At the beginning of this deposition of the witness, you were not present at that time, I believe, but it was agreed that any objection as to form would be made here and now during the taking of the deposition of the witness, and that was the basis upon which we agreed that we would conduct this deposition. At least that is my understanding of it. And there are other people here who can concur in that. So in accordance with that, so far as I am concerned, I cannot make any exception to what was to be the procedure, and objections as to form have to be made here and now.

Mr. Kieffer: At this time I wish to concur in the objection which is made.

Q. (By Mr. Pettibone) Will you answer the question?

Mr. Wolcott: What is the question?

(Question read by the Reporter.)

Mr. Wolcott: Are you objecting, Mr. Mudd?

Mr. Mudd: Well, I made the original objection.

Mr. Wolcott: Yes.

369 Mr. Mudd: Of course, obviously this is a long way from the best evidence, but if you are testing his knowledge of the regulation, I will let him answer. Of course, what he says or what he understands does not necessarily prove what the program provides.

Mr. Pettibone: Well, we all realize that a lot of the things that he testified to here thus far have not always been the best evidence on the point.

Mr. Mudd: No, but presumably on some of these technical regulations, it may not be correct. The point I am making is that to test this witness on the contents of various regulations is extending the record really without any authoritative source, you might say.

Mr. Pettibone: If I have been very technical, I would certainly have to agree with you, but I really only asked

him very broad general matters. Now, maybe I am in error, but I assume that matters in the general knowledge of a commissioned officer with his rank in the Air National Guard would be admissible.

I am trying very hard not to be very technical about the regulations, and naturally they will speak for
370 themselves anyhow.

Mr. Mudd: That is right, that is right.

Mr. Pettibone: I am asking him in a general way if he is familiar with the general civilian employment program of the National Guard.

Q. (By Mr. Pettibone) Now, will you please answer the question? A. I know that Air National Guard Regulation 40-01 provides certain information and certain requirements for the Air Technician Program. As to the status of the individual, again I am not positive.

Q. Well, you testified previously that you took a course of instruction at the Chanute Air Force Base back in 1955 and 1956, a course of training for aircraft maintenance personnel.

Now, upon the completion of that course you stated that you returned to your unit here in the Baltimore area. Were you given any duties in connection with aircraft maintenance upon your return to your unit at that time? A. As I stated, I was assigned the duties of an aircraft maintenance officer.

371 Q. And how were you paid for those duties? A. I was paid at the rate of pay commensurate with the rank of aircraft maintenance officer in the Maryland Air National Guard.

Q. What was your title? A. Aircraft maintenance officer.

Q. Now, I am referring to 1956. Well, what was the date when you first took over these duties as an officer in aircraft maintenance? It was in 1956, was it not? A. 1956, yes.

Q. Do you remember the exact date? A. I do not.

Q. The month? A. June, I believe.

Q. All right, in June of 1956. What was your title at

that time? A. I was aircraft maintenance officer of the 104th Fighter Squadron, Maryland Air National Guard.

Q. Did you have any other title? A. In the Air National Guard?

Q. In the 104th Fighter Squadron, your unit.

372 Mr. Mudd: You mean other than rank, I presume.

Mr. Pettibone: That is correct.

Mr. Mudd: Do you mind if he consults with me?

Mr. Pettibone: No, go ahead.

(Mr. Mudd and witness in conference.)

A. I was base maintenance supervisor for the 104th Fighter Squadron as an Air Technician.

Q. (By Mr. Pettibone) Is that a capacity other than your capacity as a commissioned officer in the Air National Guard at that time? A. I believe that the Regulation requires that the base maintenance supervisor be a commissioned officer in the Air National Guard. That is my belief.

Q. What Regulation? What are you referring to? A. ANGR 40-01.

Q. Yes, that is true, but let me go back to my question now, because my question was a little different than that. Is that status or position different from and in addition to let me say being a commissioned officer in the Air National Guard? I understand that you have to be a

375 commissioned officer to hold this position, but what I am getting at is, is this a different position? A. I think I have stated that, Mr. Pettibone.

Q. No, you have not, not yet. A. I was an aircraft maintenance officer in the Air National Guard and held the job title in addition as Base Maintenance Supervisor, and to perform these duties, or to have this job description, I had to be a commissioned officer in the Air National Guard. If they are separate, I don't know.

Q. Did you receive separate pay in each of these capacities? A. I did.

Q. From a different source? A. I think both pay checks were drawn on the Treasury of the United States.

Q. Were you paid at the same time or different times? A. Not necessarily at the same time.

Q. Referring to United States Exhibit No. 3 for identification, in the sixth line under the words "Base Maintenance Supervisor"—the word maintenance being
374 abbreviated as Maint, there appear the letters NGC-11. Do you see those? A. I do.

Q. Do you know what they stand for, or what they represent, or what they mean, or what they refer to? A. I believe that is a rating issued by the National Guard Bureau for Air Technician Manning purposes.

Q. And following those letters and numbers, you see further letters, S-2 and then eff, followed by a date, 16 December '57, also abbreviated. Do you know what that stands for, refers to our means, and if so, tell us. A. I believe that refers to the step, in this case Step 2, and the effective date that I attained that step.

Q. All right. Prior to May 13, 1958, then, you were a base maintenance supervisor in the 104th Fighter Squadron, as indicated herein, is that correct? A. That is correct.

Q. And then to the right of Base Maintenance Supervisor you see the term Aircraft Maintenance Chief, the word Aircraft being abbreviated, Acft. Is that another technician's position to which you were transferred on May 13, 1959?

375 Mr. Wolcott: '58.

Mr. Pettibone: 1958, excuse me.

The Witness: 16 May '58.

Mr. Mudd: I think it says effective May 16th.

Mr. Pettibone: Yes, you are correct. The order appears to be dated May 30th, but the effective date is May 16, by its own terms.

The Witness: That is correct.

Q. (By Mr. Pettibone) Now, tell us just briefly the general nature of your duties as air technician during the pe-

riod you were employed as base maintenance supervisor. A. I had overall supervision of vehicles, crash equipment, ground support equipment in the various shops and other support areas of aircraft maintenance and the responsibility for aircraft maintenance.

Q. All right. Then after your transfer to the position of aircraft maintenance chief on 16 May 1958, did you thereafter have different duties as air technician? A. I had fewer duties. I relinquished certain areas to another individual.

376 Q. Just describe briefly in a general way your duties as air technical after you became aircraft maintenance chief? A. I was concerned with aircraft maintenance and limited support for it as opposed to the overall base maintenance supervision prior to that date.

Q. Did you enter upon and perform duties of that position commencing on May 16, 1958? A. I did.

Q. Does that position require you to be a commissioned officer in the Air National Guard? A. To the best of my belief the Regulation says commissioned officer, warrant officer or—I don't recall if it is civilian or master sergeant. Maybe both.

Q. Did the change of position on May 16, 1958, which you just described, involve an increase in pay or salary for you? A. I believe the salary was the same or slightly more.

Q. Who was your immediate supervisor in your capacity as aircraft maintenance chief? A. Major Jesse D. Mitchell.

377 Q. What was the nature or extent of his supervision of your work? A. He assumed the duties of base maintenance supervisor.

Q. Is that the position which you had held previous to that time? A. That is correct.

Q. You mean the person who assumed your old position became your supervisor in your new position? A. That is correct.

Would you repeat the question again, please?

Mr. Pettibone: May I ask the Reporter to read it to you?

(Testimony read by Reporter.)

A. Yes.

Q. (By Mr. Pettibone) Referring to the United States Exhibit 3, in the seventh line of the test of this order, underneath the term aircraft maintenance chief, I see the letters NCMS-9. Do you know what those letters and number mean or refer to? A. The letters to the best of my belief and the related number designate a rate in
378 the air technician's manning document.

Mr. Wolcott: In what document?

The Witness: In the air technician manning document.

Q. (By Mr. Pettibone) What does the S-3 mean following it? A. That would indicate the step in the rate.

Q. And the letters eff I take it mean effective date of your entering into this position? A. That is right.

Q. May 16, 1958, is that correct? A. That is correct.

Q. Were you notified by anyone on or before May 16, 1958 that you were going to be transferred from the position of base maintenance supervisor to that of aircraft maintenance chief? A. I was.

Q. By whom? A. I believe Colonel Kilkowski.

Q. Do you recollect who notified you before your appointment as base maintenance supervisor? Who
379 informed you that you would be appointed to that position? A. Major Scott.

Q. That would be back in 1956? A. 1955.

Q. Did you apply to Major Scott for that position, either verbally or in writing? A. Yes.

Q. Did he discuss your qualifications for the position with you? A. He did.

Q. Did you inquire as to the rate of pay for the position? A. Very possibly.

Q. Did you discuss with him the general nature of the work and the nature of your duties? A. Probably.

Q. Were you at the time you first entered upon the position as base maintenance supervisor already assigned to the 104th Fighter Squadron as a commission officer? A. I was.

Q. How long had you been so assigned to it, sir?

380 A. Since January of 1952.

Q. And when you were transferred to the position of aircraft maintenance chief, on the effective date of May 16, 1958, did you request this transfer? A. I requested the new position, yes.

Q. To whom did you make the request? A. Colonel Kilkowski.

Q. Did you discuss with him what your duties would be in the position of aircraft maintenance chief? A. I did.

Q. Did you see any written description of your duties as aircraft maintenance chief? A. Very probably, yes, sir.

Q. Was that on the occasion when you discussed your transfer to this position with Colonel Kilkowski? A. I don't recall the exact date.

Q. Approximately at that time, though? A. Approximately at that time, yes.

Q. Do you have a copy of that description of your duty as aircraft maintenance chief at the present time? A. There is a copy on file at the 104th Fighter

381 Squadron.

Q. You have read it, have you? A. I have.

Q. Had you read it on or before May 20, 1958? A. I had.

Q. Let me rephrase my question.

Had you read it before May 20, 1958? A. I had.

Q. Was there a written description of your duties as base maintenance supervisor on file at the Headquarters of your Squadron before May 20, 1958, at your old job? A. There was a copy on file.

Mr. Wolcott: Will you identify the document, Mr. Pettibone, instead of getting a description of it?

Mr. Pettibone: I will do that.

Q. (By Mr. Pettibone) Had you read it? A. I had.

Mr. Pettibone: Will the Reporter mark this, please, as United States Exhibit No. 4 for identification?

(Outline of duties of Aircraft Maintenance Chief referred to marked U. S. Exhibit No. 4 for identification.)

382 Mr. Wolcott: What is this up at the top there, Mr. Pettibone?

Mr. Pettibone: Is this off the record?

Mr. Wolcott: Yes.

(Discussion off the record.)

Q. (By Mr. Pettibone): Referring to United States Exhibit No. 4 for identification, do you know what this document is, Captain McCoy? A. I do.

Q. Can you tell us what it is, or what it is a copy of? A. It is a job description of aircraft maintenance chief, and it is an extract of the Air National Guard Manual, 40-01.

Mr. Wolcott: Well, isn't there an overall title, Civilian Personnel Manual?

Mr. Pettibone: You have it there.

Mr. Wolcott: I mean is this where this comes from, the Civilian Personnel Manual?

Mr. Pettibone: That is right.

Mr. Wolcott: All right.

383 Q. (By Mr. Pettibone) Is this document which we have identified as United States Exhibit No. 4 for identification the same as the description of your duties as aircraft maintenance chief on file with your unit that you just referred to in your testimony? A. This is the document I have reference to.

Q. This is a copy of the same document, is that what you mean? A. That is right.

Q. And does it describe the duties which you began performing on May 16, 1958? A. Let me state at this time that Major Mitchell had not returned from the aircraft maintenance school, and I was still acting as his subordi-

nate or second in command, performing those functions of the overall base maintenance supervision in addition to those listed in the manual.

Q. You mean you held two positions on May 16, 1950? A. As Major Mitchell's second in command I was responsible for overseeing certain functions that he would normally oversee had he been present.

Q. All right. And when did he return to the unit?
384 A. In November of 1958.

Q. So that during that period of time from—was it May 16th until November of '58, in his absence you had been looking after his duties as well as your own, is that what you mean? A. I had the responsibility for certain areas for this aircraft maintenance care.

Q. And then after he returned in November of 1958, you performed only the duties described generally in United States Exhibit No. 4, those prescribed for aircraft maintenance chief? A. That is correct.

Q. Do you recollect whether you performed any specific duties other than those described in United States Exhibit No. 4 on May 20, 1958? A. Other than these?

Q. Other than these listed in Exhibit 4 for identification. A. As Air Technician?

Q. That is right. A. I have no knowledge of any
385 specific duties. It is there possibly.

Q. I am referring now, of course, to your duties as Air Technician. A. That is correct.

Q. And those duties specifically described in Exhibit 4, for aircraft maintenance chief, and I am referring specifically to May 20, 1958.

Perhaps you answered this already, and if so, forgive me, but maybe I am a little confused, and I would like to get it straight. What I mean, did you perform any duties other than those referred to on that day as far as you remember?

Mr. Wolcott: I object to that in form. It is too broad, and it calls for a conclusion on the part of the witness, and a conclusion of law.

Mr. Pettibone: Well, I will be glad to try to reform the question so that it will be admissible.

Specify the part which you object to.

Mr. Wolcott: Well, I have stated my objection.

Mr. Pettibone: Well, I am afraid I do not understand it then. Could you make it more specific?

386 Mr. Wolcott: I think my objection stands on the record, and I don't feel it is necessary to add to it.

Mr. Pettibone: Well, all right, let the Reporter please read to me from the record the statement of the objection made by Mr. Wolcott.

(Statement referred to then read by Reporter.)

Mr. Wolcott: I think you ought to be specific.

Mr. Pettibone: I will withdraw the question and rephrase it as follows.

Q. (By Mr. Pettibone) Referring to United States Exhibit No. 4 for identification, in your capacity as Air Technician did you perform any duties on May 20, 1958 in addition to or other than those listed therein?

Mr. Wolcott: Objection. Whatever he performed cannot be characterized. You can ask him what he did. Now you are asking him to characterize it.

Q. (By Mr. Pettibone) All right, subject to that change, instead of saying what duties did you perform, did you do anything then other than the activities listed in this exhibit?

Mr. Wolcott: I make the same objection, on the

387 same grounds.

Q. (By Mr. Pettibone) All right, answer it.

Mr. Buckmaster: He stated he performed other duties.

Mr. Wolcott: He stated that he performed other duties.

Mr. Buckmaster: As supervisor.

Mr. Wolcott: I am sorry, I did not hear it.

I would like the witness to answer it.

The Witness: My answer was very possibly I performed other duties.

Mr. Wolcott: That is correct.

The Witness: I don't recall specifically any duties.

Mr. Wolcott: That is what he said.

Q. (By Mr. Pettibone) Prior to May 16, 1958, while you were base maintenance supervisor, who was your immediate superior, to whom you were responsible for the performance of your duties? A. Colonel Kilkowski.

388 Q. And on and after May 16, 1958, when you became aircraft maintenance chief, who initially was your superior, to whom you were responsible for the performance of your duties? A. Major Mitchell held the job as base maintenance supervisor. However, in his absence Colonel Kilkowski was my immediate supervisor.

Q. That would be from the period of May 16th to November of 1958? A. That is correct.

Q. And then is it correct that in November, when Major Mitchell returned to the unit, he became your immediate supervisor? A. That is correct.

Q. How many hours were you required to work per week in your capacity as aircraft maintenance chief? A. I can best answer that by saying that to the best of my belief a normal work week was a forty hour week.

Q. Did you actually work forty hours per week? A. To the best of my belief, yes.

Mr. Wolcott: Excuse me but——

389 Q. (By Mr. Pettibone) Were time records kept of how many hours you worked per week? A. I assume so.

Mr. Wolcott: Excuse me, but may I inquire——

Off the record.

(Discussion off the record.)

(Thereupon, at 12:30 o'clock p.m., a recess was taken until 1:30 o'clock p.m.)

AFTER RECESS

Q. (By Mr. Pettibone) Now, referring to your activity, first as base maintenance supervisor, and then subsequently as aircraft maintenance chief, you testified I believe just before the recess that you worked forty hours a week. What time did you normally start to work in the morning? A. Well, the normal work week hours from 8:30—or, excuse me, 8 o'clock in the morning to 4:30 in the afternoon, Tuesday through Saturday.

Q. Did you check in with anyone when you reported for work in the morning normally? Did you have a time
390 clock? What system was there if any? A. We have a roll-call type of system rather than time clock, whereby your attendance is recorded on a roster.

Q. You mean someone who called the roll or read the roster every morning? A. This is true in the case of everyone except the officers.

Q. Well, I am referring to other than air technicians or other civilian employees of the unit. What system was maintained of keeping records of their working hours? A. That is an overall administrative function that I am not qualified to go into too deeply. However, the employees, with the exception of those people who wore an officer's uniform, were required to attend the roll call.

Q. Well, about how many people in those air technician jobs wore officers' uniforms in say May of 1958? A. Approximately seven.

Q. And about how many others were there who were not officers, who did not wear the officer's uniform? A. Approximately 120.

Q. Were you the only aircraft maintenance chief? A. That is correct.

391 Q. Were you the only base maintenance supervisor prior to May 16, 1958? A. That is correct.

Q. Approximately how many people would you supervise while you were base maintenance supervisor? A. Approximately 80 people.

Q. And about how many did you supervise after you became aircraft maintenance chief? A. Approximately 40. These are all approximations.

Q. I understand, yes. A. This is after I assumed the duties of aircraft maintenance chief, when Major Mitchell had joined our staff.

Q. If you were not present for duty or actually on duty in your capacity as aircraft maintenance chief, or before that as base maintenance supervisor, at any time between 8:30—and did you say 5 o'clock? A. 8 to 4:30.

Q. 8 to 4:30. Excuse me. A. Between 8 and 4:30.

Q. Between 8 and 4:30, on the work days Tuesday through Saturday inclusive, did you have to report
392 your absence to anyone? A. In the interest of good management, our absence was reported, yes, to a superior and to a subordinate.

Q. Well, suppose you were sick some morning—were you ever sick and for that reason did not go down to work in the morning? A. Yes.

Q. That has happened? A. That has happened.

Q. And what would you do in those cases? Call up and tell anyone? A. That is right.

Q. Who would you call? A. Two people: The Commander and the person responsible for making the appropriate entries in the attendance form.

Q. Now, were you entitled to a certain amount of sick leave under certain conditions? A. That is correct.

Q. Do you know how much sick leave you were entitled to per year, or per week, or however it was, what-
393 ever the system was? Tell us what it was. A. I believe at that time it was accrued at the rate of 120 hours of sick leave per year.

Q. By that time, you are referring to 1958? A. May 1958, or at the time I took over the duties of aircraft maintenance.

Q. It was measured in terms of hours, is that correct? A. That is correct.

Q. And were the hours credited if you were entitled to cumulative pay over a period of time? A. They were.

Q. Now, if you were absent for other reasons other than sickness, if you wanted to just have some absence to do something of a personal nature, were you entitled to take a certain amount of leave for that purpose? A. We were.

Q. Do you remember how much or what the system was on that? A. I believe that accrued at the same rate, 120 hours a year.

Q. And if you wanted to have such leave, did you
394 apply for it in advance? A. That is normal procedure, yes.

Q. To the same people that you notified in cases of sickness? A. That is correct.

Q. Who are these people, by the way? A. That would be the Commander and——

Q. You mean the Base Detachment Commander? A. The Base Detachment Commander.

Q. Yes. And the other one—— A. ——would be the administrative clerk who would be responsible for maintaining the records.

Q. You mean the administrative clerk who kept the time and attendance records? A. That is correct.

Q. Was your pay based upon those time and attendance records, do you know? I am talking about your pay now, and I am speaking about the base supervisor, or, rather, aircraft maintenance supervisor. A. It is my understanding, yes, it was based on the number of hours that you were in attendance or legally absent.

395 Q. All right, if you exceed the number of hours authorized for sick leave, or for vacation, or annual leave, whatever the exact term would be, if you exceeded the number of allocated number of hours, did you suffer a reduction in pay? A. I understand you would.

Q. I take it that never happened in your case, though. A. Not to my knowledge.

Q. All right. Now, were there any other kinds of leave that you were authorized to use besides the two that I

have already mentioned? A. Your authorized leaves were attendance at the summer encampment, summer training.

Q. That would be for those two weeks, the normal two weeks period that you mentioned before in your testimony? A. That is right.

Q. What kind of leave would that be called- I take it that is apart from those other two as we have talked about, annual leave and sick leave. A. That is correct.

Q. Would that be perhaps called military duty or
396 something like that? A. I suppose that is the general term of it.

Q. Anyhow, the hours of leave which were used in that manner were separate and apart from leaves which you used in those other categories? A. To my understanding, yes.

Q. That applied when you went to summer training periods. Did it apply to any other time? Were there any other training periods for example than this summer encampment that you have referred to where that kind of leave could be taken from your civilian or from your employment as aircraft maintenance chief? A. Only for special reasons. I know of no set policy.

Q. Now, during the course of a year, in addition to these two weeks summer training periods, you also had other training periods, didn't you, that lasted for maybe a couple of hours at a time, some kind of weekly meeting, perhaps, something like that? A. We had our training assemblies, that generally lasted the entire day.

Q. That was training in connection with your
397 status as Captain, or before that as a Lieutenant in the Air National Guard? Would that be the nature of that training? A. That is correct.

Q. And would you say these periods would last all day when you had them? A. That is correct.

Q. About what time would they start in the morning? A. The general training assembly started at nine o'clock in the morning.

Q. Yes. And how often approximately did you attend these, say during the year 1958? A. Roughly twice a month.

Q. And on what days of the week would they normally come? A. They were on Saturdays.

Q. Would you take leave from your job as Aircraft Maintenance Chief or Base Maintenance Supervisor in any form to attend those sessions? A. Not necessarily.

Q. Well, you mean you were present for duty in your capacity as Base Maintenance Supervisor or Air-
398 craft Maintenance Chief on those Saturdays? A. No, sir.

Q. You were not? Well, how were you carried on the records? A. I stated that normally our work week is Tuesday through Saturday.

Q. Yes. Well, Saturday is a work day then normally? A. Normally.

Q. And then those meetings I understood came on Saturday? A. That is right.

Q. Now, how were you carried on the time and attendance records as respects your job as aircraft maintenance chief? A. I say again the normal work week is Tuesday through Saturday. However, where a general assembly interfered with a normal work week, then as air technician you could compensate your air technician status by working another day, Sunday or Monday, or possibly on a night duty of some kind.

Q. Oh, I see. In other words, you ended up in any given week as spending actually forty hours on your air
399 technician's job? A. That is correct.

Q. And if your training period happened to come in a normal work week, you worked some other day? A. That is correct.

Q. Now, in other words, any time that you spent in training as distinguished from working at your air technician's job, that was made up that week, or at least in and around that time, by working at other times, so that your total

time spent working at your air technician's job averaged out forty hours a week? A. That is correct.

Q. Now, part of your training duties and requirements in your capacity as a Captain in the unit, and before that as a lieutenant, were used in making training flights, is that correct? A. I had a commitment to fill the training criteria.

Q. Let me put it this way: You did from time to time make training flights? A. That is correct.

Q. And in which you took an airplane and piloted
400 it to some place for a period of time. Did you ever make any of those flights during the normal working hours you have mentioned in connection with your air technician's job, that is to say, between eight and four-thirty, Tuesday to Saturday? A. I did.

Q. And did you do that frequently or infrequently or about how often would you say? Let us take the year 1958. A. I don't know how often this could be determined.

Q. Well, I realize that, but in a general way, would you say once every, oh, say once every month, or more often or less days than that? A. More often.

Q. Once a week perhaps? A. Perhaps.

Q. And what was the average?

Mr. Wolcott: Wouldn't the flight records show that?

Mr. Pettibone: Yes.

Mr. Wolcott: I am sorry.

Q. (By Mr. Pettibone) About how long—if those flights had an average length or duration, about how long
401 would that be? Would you normally make a flight for an hour or several hours, or perhaps you can't say.

Mr. Wolcott: I object to the form of the question.

Mr. Pettibone: Let me reframe it. I will withdraw it.

Q. (By Mr. Pettibone) Now, what was the average length of time or duration of those flights? A. I would assume the training flights were generally from an hour to an hour and a half in duration.

Q. When you would make such flights during a normal day's working hours, for an air technician such as yourself, did you make up that time at some other time during the week, the same as you did with the other training? A. Not necessarily.

Q. How were you carried on the roster during that period as to time and attendance in your air technician's capacity or employment? A. Present.

Q. Well, did you sometimes make up the time consumed in the training flights by working extra hours that week?

Mr. Wolcott: I object to that. It has already
402 been answered.

Mr. Pettibone: No, he said sometimes, and I want to know what it is.

The Witness: I said not necessarily.

Q. (By Mr. Pettibone) Well, that is not an answer to the question, really. That is not an answer at all. And I would like to have the answer to it.

Mr. Wolcott: I object to you arguing with the witness.

Mr. Mudd: Let us retrench now. What is the question? Did he ever make up the time that he spent in flying away from his air technician's weekly and hourly requirements?

Mr. Pettibone: Yes.

Mr. Mudd: All right.

Can you answer that, please?

A. Well, I am not aware that that requirement existed

Mr. Mudd: All right.

Mr. Wolcott: All right.

Q. (By Mr. Pettibone) I am sorry, but that still
403 is not an answer to my question.

Mr. Wolcott: He has answered it.

Mr. Pettibone: That is not an answer to my question.

A. I don't recall. Let me answer it this way: I don't recall that specific instance where I set aside a portion of the time to compensate the air technician program for having flown. However, there may have been many times that I gave time too. I don't remember that there is any

specific instance that I can say that I deliberately set aside a portion of the time to compensate the air technician's program.

Q. (By Mr. Pettibone) Well, could you state it the other way around? Were there any times when you did compensate for your air technician's program, as you call it, by working additional hours?

Mr. Wolcott: I submit he has already answered it.

Mr. Pettibone: No, he has not answered this question.

Mr. Wolcott: Before that, he answered this particular question.

Q. (By Mr. Pettibone) Well, there is a question.
404 Will you answer it, please? A. I don't recall any particular instance that I worked any additional hours to compensate the time I may have flown during a normal working day.

Q. Well, then, in other words, you used some of these forty hours per week on your air technician's time, in some part of that time each week, or some weeks, at least, that was devoted to flying?

Mr. Mudd: Objected to. The witness has not said that, Mr. Pettibone, but he said——

Mr. Pettibone: Then I would like to have him correct me where I am wrong. That is what I am asking him, is that right or wrong.

Mr. Mudd: Just a moment. I object to the suppositions contained in your question and the inaccurate conclusions drawn from the witness' answers. He said he does not recollect. He has not said it did not happen or it did happen, but he does not recollect, and there is a major distinction there.

Mr. Wolcott: Well, just to put in my objection here, I don't quite agree with either Mr. Pettibone's or
405 Mr. Mudd's summary. As I understand it the witness has already testified that he flew a part of his training program during the hours from 8 to 4:30. He said that a number of times. And I don't think that it can

be summed up or characterized, because the record already states what he says about it.

Mr. Kieffer: I concur in that objection.

Q. (By Mr. Pettibone) Well, then, apart from any specific instances, do you have any recollection in general as to whether or not you worked extra hours to compensate for the time during normal working hours in a week you might have spent in training flights?

Mr. Kieffer: I object.

Mr. Wolcott: I object too. He has already answered it several times.

Q. (By Mr. Pettibone) Well, answer it again, anyhow. A. The only answer I can give you, Mr. Pettibone, is that I have no recollection of compensating the air technician's program for any portion of the time that I may have used for flying, as a specific case, or as a general case.

I might make one addition to the answer.

Q. You mean you want to change your answer?

406 A. No, I don't want to change my answer, Mr. Pettibone. I would like to make an addition to the answer.

Q. All right. A. We are authorized, or as a pilot you are authorized certain flight training periods.

Q. By whom? A. By the National Guard Unit, by order of the Air Force, as I understand it, in which case you can by satisfying certain requirements, such as time spent flying and time spent in certain other functions, receive compensation, I believe to the amount of one day's pay per flight training period, and there have been cases possibly where I flew as an air technician, in air technician work, during an air technician's work day, and the time taken from that was subsequently made up to satisfy the air technician's work day and the flight training period requirements.

Q. Were you told by your counsel to give this additional information and perhaps add it to your previous answer to my question?

Mr. Mudd: Mr. Pettibone, if you had been looking at

this end of the table, you would have seen him lean
407 to me and asked me if he could make an addition to it, and I said, "Yes, go ahead and make the addition." I have had no conversation whatsoever with Captain McCoy, and I resent Mr. Pettibone's suggestion.

Mr. Pettibone: I just inquired how it happened.

Mr. Mudd: No, you did not just inquire either. And I will ask Mr. Wolcott, sitting right across the table, if my statement is not correct.

Mr. Wolcott: That was my impression.

Mr. Pettibone: Well, I don't think it serves any purpose for us to go into it.

Mr. Mudd: I should say it does not.

Q. (By Mr. Pettibone) Let me ask you this, Captain McCoy, do you receive any compensation from anyone for the time you spent in flying status, that is to say, when you performed those training flights that we are referring to? A. There are a certain maximum number of flight training periods that a pilot can accomplish throughout a year, or a quarter, and during the training assemblies is the only compensation to my understanding you can receive for flying. However, flights may be conducted beyond
408 these periods.

Q. Well, if you fly the normal number of required hours, do you receive compensation of some kind for it? A. Required to what extent?

Q. Well, you just mentioned certain requirements, that you had to spend so much time flying. Didn't you have to spend so many hours then in a given period, say such as a year, in order to maintain a certain status? There are requirements to that effect, are there not? A. The requirement is not to satisfy a monetary charge.

Q. No, the number of hours, I said. I did not mention monetary. A. This number of hours is specified by the regulations, and I would have to fly more hours, for me to accomplish a certain amount of flying training.

Q. All right, so you have to spend, in order to comply

with this regulation, you have to actually spend so much time flying, do you not? A. That is correct.

409 Q. Now, my question is this: If you spend that amount of time that is required, do you receive any monetary compensation for it? A. Possibly.

Q. Well, do you happen to know? A. Possibly.

Q. Does that mean yes? A. It does not mean yes or no, Mr. Pettibone.

Q. Does it mean that you don't know? A. Mr. Pettibone, I may or may not receive compensation for flying.

Q. That is not an answer to my question.

Mr. Mudd: That is the witness' answer.

Mr. Pettibone: I want an answer to the question to the witness.

Mr. Mudd: That is the witness' answer.

Mr. Pettibone: You know it is not the answer, Mr. Mudd.

Mr. Mudd: Well, that is the witness' answer.

Mr. Pettibone: Mr. Mudd, I wish you would bear in mind that I have the right under the Rules of Civil Procedure

410 under the Rules to stop this proceeding at this point and go before a Court and request the Court to instruct the witness to answer a direct and precise question in a matter of this kind.

Mr. Mudd: That is your option. He has answered the question.

Mr. Pettibone: That is not an answer to my question.

Mr. Mudd: That is your option. But you are making the accusation that the witness knows it.

Mr. Pettibone: I don't make that accusation, and if you are making the statement that I am making that accusation, I deny that I am making any accusations, or that I made any. I did not make any accusations, and I am not making any accusations. So the record is straightened out on that point.

Mr. Mudd: Well, the record is there.

The Witness: Will you restate your question, Mr. Pettibone, and maybe I can be more specific in the answer.

Mr. Pettibone: All right, let me ask the Reporter to please re-read the question.

(Question read by the Reporter.)

A. I can answer it this way, Mr. Pettibone, that it
411 is very possible that I can fly on the 24 training assemblies that they have during the year, and I would receive compensation, but I might not satisfy the requirements as laid down by the Department of the Air Force and who placed me on flying status, and then I would be required to fly on other days without necessarily being compensated.

Q. (By Mr. Pettibone) Well, if you did satisfy the requirements of the Air Force Regulations, would the flying which you did to satisfy them result in your receiving monetary compensation? A. I don't believe it would be possible to satisfy them in 24 days.

Q. I don't understand what you mean by satisfying them in 24 days. I mean satisfying them in whatever time period the regulation itself provides. A. Well, I get paid for 24 training assemblies per year. All forty-eight training assemblies that were accomplished in 24 days.

Q. Yes, and that means any 24 days out of a calendar year? A. That is not true necessarily.

412 Q. Well, 24 days out of a calendar year? A. Yes, 24 specified days.

Q. 24 specified days out of a calendar year? A. Yes, sir.

Q. All right, if you meet that requirement, do you receive compensation, financial compensation, for it? A. I receive financial compensation for the 24 days, yes.

Q. Does part at least of the 24 days requirement however include or involve flight time, that is, flying an aircraft? A. They generally would require flying, yes.

Q. So that in flying an aircraft you are accumulating time to the satisfaction of the 24 day requirement at any given time? A. My primary duty on those 24 days would not be to fly aircraft, but my primary duties would be to perform the duties of an aircraft maintenance officer. How-

ever, flying could and probably would be conducted in those 24 days.

413 Q. Well, let me go back. Possibly this is repetitious, due to the little break here. Do I understand that you said that in performing the flying activity you would be accumulating time toward the ultimate possible satisfaction of the 24 day annual requirement? A. That is not correct.

Q. Well, will you restate it and make it correct for me. I may not have it quite right. Please set it straight for me, if you will be so kind. A. I said that during these 24 days my primary duty would not be to fly an airplane necessarily but could conceivably be part of the program. My primary duty would be as an aircraft maintenance officer.

Q. Well, would your duties as aircraft maintenance officer, or aircraft maintenance chief rather, I believe, which is the correct title according to the orders which are before us as United States Exhibit No. 3, would the duties of that position require you to perform training flights? A. As an aircraft maintenance chief?

Q. That's right. A. That is not my job description

414 on these 24 days that I have reference to.

Q. In other words, the flying the aircraft relates to the 24-day requirement of the Air Force Regulations, is not part of your job description as an aircraft maintenance chief? A. That is not true.

Q. Well, what is true? A. Flying an aircraft is part of my requirement to satisfy the Department of the Air Force, since they have given me the rating and require that I make frequent and regular aircraft flights and satisfy certain minimums as outlined in Air Force Regulation 60-2 and other manuals; has nothing to do with job description.

Q. It has nothing to do with your job, or the description of the job, or the duties of the job of aircraft maintenance chief? A. That is correct.

Q. All right. We have referred to these flights which you made from time to time for training purposes. Are these

sometimes called proficiency flights, or proficiency
415 training flights? A. They are.

Q. Would that be a proper way to refer to them? I mean is that the correct way to refer to them, according to usual terminology? In other words, what are they commonly called? A. I think proficiency is the general accepted broad term for the flights.

Q. All right. Now, in addition to proficiency flights of this nature did you make any other kinds of flights at any time? A. I did.

Q. How would you describe those flights? A. I have made flight check flights on the aircraft and equipment, in which there is an element of proficiency gained.

Q. What do you mean by a flight check flight? What is the specific purpose of a flight of that nature? A. I was qualified to evaluate the condition of an aircraft after, for instance, certain maintenance had been performed; to be a flight check of the equipment that was—it would be a flight check of the equipment.

416 Q. That would be a different kind of a flight from a proficiency flight then? A. Proficiency would be attained in that flight as well as in the other flight, or maintained.

Q. Yes, I suppose one could say any kind of a flight you make for any purpose would in that respect be a proficiency flight, would it not? A. I would think so, yes.

Q. But I am not referring to that aspect of it. This would be a flight made for a purpose specifically other than proficiency. The proficiency, in other words, would be only incidental, is that correct? A. Possibly.

Q. Well, excuse me now, Captain McCoy. I don't like the answer "possibly" because it is either yes or no. Could you say one or the other for me? A. I think I stated a moment ago that proficiency is the broad term that is applied to flights, since, as you have stated, an element of proficiency is gained from all flights. Now, I will not dif-

ferentiate between one type flight and say it is a pro-
417 ficiency and the other type is not a proficiency flight.

Q. No, I realize that and that is not what I asked you. The question is this: The specific, immediate purpose of a check flight is not your proficiency, if you make it to determine mechanical condition of the aircraft, is that right? A. That is correct.

Q. All right. Did your employment as aircraft maintenance chief involve a requirement that you make from time to time check flights, that is check flights or maintenance operational checks? A. There is no requirement to my knowledge in the job description of an aircraft maintenance chief that he be a rated pilot and be required to make flight checks or other checks on the equipment.

Q. Now turning specifically to the day of May 20, 1958——

Mr. Wolcott: Could you excuse me a minute. Could you read the last question and answer back?

(Question and answer read by Reporter.)

Mr. Wolcott: Before you ask the next question
418 I'd like to move to strike out the answer as not responsive.

The Witness: I would be happy to make an addition to the answer if it will help.

Mr. Wolcott: Go ahead. Make an addition.

The Witness: To further answer Mr. Pettibone's question let me say that——

Mr. Pettibone: Well, now hold it just one moment, please, Captain McCoy, before you proceed.

Mr. Wolcott: He has a right to complete it.

Mr. Pettibone: I didn't say he didn't. I just asked for a moment's pause.

Mr. Wolcott: Okay. I'm sorry.

Mr. Pettibone: Well, you have something further you want to say, Captain McCoy?

The Witness: Yes, as an addition to the answer to your question, since I was in the capacity of aircraft maintenance officer for the 104th Fighter Squadron——

Mr. Pettibone: Excuse me. You mean as aircraft maintenance officer you are referring to your capacity at that time as a Captain——

The Witness: That's right.

419 Mr. Pettibone: —in the Air National Guard, as distinguished from your employment as aircraft maintenance chief. Is that what you mean?

The Witness: That is correct.

Mr. Wolcott: No. I don't see what——

Mr. Pettibone: Well, he said officer, Mr. Wolcott, and the term here is "chief".

Mr. Wolcott: I understand then he has three jobs. His job as an Air National Guard Captain is one. Then the other job is aircraft maintenance chief.

Mr. Pettibone: That's right, two jobs.

Mr. Wolcott: But you are making a third one, aircraft maintenance officer.

Mr. Pettibone: He used the term "officer". Let the Reporter read it back.

Mr. Wolcott: Maybe he used it, but I am trying to get it straight.

The Witness: In my capacity as a Captain in the Air National Guard, with the job description of an aircraft maintenance officer and being qualified to perform flight checks on equipment, and as I stated before there is

420 no requirement in the aircraft maintenance chief job description to make these flights, but since I was there full time and had this dual responsibility then again with an eye for safety in the best operating equipment I felt that it was necessary that these flights be accomplished and in the absence of the base maintenance supervisor, who would normally make these flights, I did so. I accomplished them.

Q. (By Mr. Pettibone) Well, I gather what you mean is what you are saying is that you, in a dual capacity——

Mr. Wolcott: I object to your summation, Mr. Pettibone.

Mr. Pettibone: I am asking a question.

Q. (By Mr. Pettibone) You had a dual capacity?

Mr. Wolcott: I think he has already answered and I think you should put a question, not summarize.

Mr. Pettibone: I am putting a question.

Q. (By Mr. Pettibone) You were in a dual capacity, is that right? A. I had two job descriptions, yes.

Q. Now, in one job description you were an Air
421 National Guard Captain, is that correct? A. It is my understanding that I was an Air National Guard Captain all the time.

Q. Yes, I realize that all the time in one capacity you were an Air National Guard Captain. In the other capacity you were an aircraft maintenance chief? A. I was an Air National Guard Captain and aircraft maintenance chief.

Q. Now, in the first capacity could you make maintenance, operating check flights? A. In the first capacity, yes.

Q. In the other capacity was that part of your job? Could you make them? A. I could make them, yes.

Q. Was it part of your job to make them in that capacity? A. I was still a Captain in the Air National Guard and——

Q. That is what we talked about first. Now I am talking about the other capacity.

Mr. Wolcott: Wait a minute. I think you have gotten it all the way around. I thought first was the air-
422 craft maintenance chief. Is that the way you understood it, Captain, first capacity?

The Witness: Well, let me answer.

Mr. Mudd: Just a minute.

Mr. Pettibone: Please, Mr. Wolcott, will you let me finish my questions and then object to them?

Mr. Mudd: Captain, answer the questions that are put to you.

The Witness: Well, I want to clarify this first and second capacity that has been brought up.

Mr. Mudd: It has been gone over. Mr. Pettibone has a question. Hear the question and then see what it is. Let's have the question.

Q. (By Mr. Pettibone) Now in hopes we can keep this clear between us, Captain, I will start again all over. In one capacity you were a Captain in the Air National Guard and were in that capacity acting as aircraft maintenance officer? A. That's correct.

Q. In another capacity you were employed by the 104th Fighter Squadron as an aircraft maintenance chief?

423 Mr. Mudd: Object. I don't like the words "employed by the 104th." It is possibly misleadingly classified. It might be better——

Mr. Pettibone: I think your objection is well taken. Let me rephrase that question.

Q. (By Mr. Pettibone) You were also at the same time employed in the capacity of aircraft maintenance chief, is that correct? A. That's correct.

Q. Now did your status as aircraft maintenance officer, the duties of that assignment and position require you to make maintenance operational check flights of aircraft? A. As a rated pilot and being required to perform certain flights to satisfy the Department of the Air Force and having fulfilled the qualifications necessary to make me capable of performing operational checks on aircraft, then part of my duties I assume would be the responsibility for the aircraft and to test fly them or to flight check them.

Q. All right. Now, in the other capacity in which you were employed as aircraft maintenance chief were you either required or authorized in that capacity, dis-

424 tinguished from this other one, to make maintenance operational check flights of aircraft? A. I don't believe any aircraft maintenance chief, per se, is authorized to make aerial flights. The authorization comes from the Department of the Air Force.

Q. Now turn specifically to May 20, 1958. Do you remember what time you reported to work that morning?

Mr. Mudd: I am going to object again if we are getting into his minute by minute, hour by hour movements on May 20th inasmuch as it was gone into in extensive detail on the original. If you have some pertinent questions I

don't mind the question on that, but if we are going to take it from the beginning of the time he reported to work——

Mr. Pettibone: No, I didn't have that in mind. I don't want to take up the time myself either to go all over every little detail. I do have a few items that I hope I can get to properly and without any delay.

Mr. Mudd: All right.

Q. (By Mr. Pettibone) I would like to start off with the question which I just asked. Do you remember what time you came to work that morning May 20th?

425 A. Approximately 8 o'clock.

Q. Now, you had planned to make a proficiency training flight on that day previous to May 20th, had you not?

Mr. Wolcott: I object to leading the witness.

Mr. Pettibone: Well, how can I speed the thing up if I don't ask him leading questions, because it is already in here. He stated it.

Mr. Wolcott: That's all right, I say, but I think you ought to conduct it just by questions in proper form.

Q. (By Mr. Pettibone) When you came to work on May 20, 1958, did you have any plans to make a proficiency training flight that day? A. I did.

Q. When had you first made those plans? A. On the previous Saturday.

Q. Had you spoken to anyone about the plans? A. I had.

Q. To whom had you spoken? A. Colonel Kilkowski.

Q. What specifically had you said to him in that

426 connection? I mean summarize what you said to him in that connection.

Mr. Mudd: Objection. It is all repetition. It has been covered before.

Mr. Wolcott: I join in the objection.

Mr. Pettibone: Well, obviously between Mr. Wolcott and Mr. Mudd I wouldn't be able to ask any questions.

Mr. Mudd: That is not correct.

Mr. Pettibone: If I ask a leading question Mr. Wolcott objects. If I make a direct question Mr. Mudd objects.

Mr. Mudd: I think you have done pretty well.

Mr. Wolcott: That is the first time I interposed that kind of objection after three hours or so.

Mr. Pettibone: Well, I haven't equalled your time yet, Mr. Wolcott, in spite of the three hours.

Mr. Mudd: God forbid.

Mr. Wolcott: Well, it is there for you to shoot at.

Mr. Pettibone: Let's have a five minute break.

(Thereupon, there was a short recess taken.)

427 Q. (By Mr. Pettibone) Did you mention to Colonel Kilkowski on the Saturday preceding May 20, 1958 that you wanted to take a passenger with you on the plane? A. I believe that is in the record, Mr. Pettibone.

Mr. Mudd: Just a minute. And for the record I am going to object and instruct the witness not to answer any further questions dealing with May 20th inasmuch as it was covered extensively at the prior two sessions of the deposition and the copies of those depositions have been available to counsel for the Government for some two or three weeks at this time and now to go back and ask questions which have already been covered seems to me to be within the Federal Rule granting the witness protection from harassment.

Mr. Pettibone: Do you mean you object?

Mr. Wolcott: Well, I'd like to note that I disagree with Mr. Mudd here. I think the counsel of the Government has a perfect right to cross examine.

Mr. Pettibone: I just want to get one thing clear. Do you refer to any question I asked him about the events of May 20, 1958? That is what you said.

428 Mr. Mudd: No. I understood originally, Mr. Pettibone you had several specific points that you wanted cleared up or brought out. I have no objection to those, but to go back to items that have already been covered, to me seems burdensome and harassing the witness, which the witness should be protected from, I think. I also understood at the beginning of the deposition that counsel would attempt in an orderly fashion to let Mr. Galiher conduct

the original investigation and that there would be an attempt by counsel thereafter not to plow the same field and in my judgment this field has been well plowed in the last two Saturdays to which Captain McCoy submitted to deposition.

Mr. Wolcott: Well, I'd like to say in view of the remark of Mr. Mudd that I entirely disagree with him. I have gone over the record and I don't think the field, to use the colorful description supplied by Mr. Mudd has been—that the same furrow has been plowed twice. The field may have been better plowed, but not the furrow and I certainly don't object and I think Government counsel has the right to cross examine.

Mr. Mudd: See. Now, Mr. Wolcott is on your side,
429 Mr. Pettibone.

Mr. Wolcott: Well, I think he has a right——

Mr. Pettibone: Well, you will force me, if you instruct the witness not to answer the next question which I have, you will force me to terminate the proceeding, Mr. Mudd, so we can take the matter before the Court.

Mr. Mudd: It is all right.

Mr. Pettibone: Because I think you are denying my rights, the Government's rights, the United States' rights.

Mr. Mudd: That's all right.

Can I confer with my client for a moment?

Mr. Pettibone: Certainly. Go right ahead.

Mr. Mudd: Captain McCoy says he thought you were under the impression that I had said "any question." I didn't mean to imply any question. I accepted your suggestion earlier that you had a few points you wished to bring up and if they are new points or unclear points or additional points I, of course, have no objection to them but I do object to covering the same material that has already been covered, and if you'd care to discuss with me in private or in public the general areas that you wish
430 to inquire into perhaps it can be worked out.

Mr. Pettibone: Well, I am endeavoring to the

cedures, which meetings we attended, and we are still continuing to abide by it."

548 Do you recall making that statement, Captain? A. I recall making the statement.

Q. I will show you a transcript of it (handing transcript to witness).

MR. MUDD: He said he recalled making the statement.

MR. WOLCOTT: All right.

A. I recall making the statement.

MR. WOLCOTT: Do you want to make any qualification of it, whether he made it or not.

THE WITNESS: If you are going all through that testimony, you will see that there was a discrepancy on the point of time, because the C.A.B. people asking the question did not pinpoint the point of time, and I don't know whether this particular thing refers to May 20th, and we never had been clear on it at the C.A.B. Hearing, as to what point of time we were speaking about.

Q. (By Mr. Wolcott) Captain, if you want to make any qualification or further clarification of that statement, you will feel free to do so. You are free to make any further statement, and you can go right ahead.

550 THE WITNESS: There have been, and there were meetings prior to the accident on May 20th and there were meetings subsequent to the accident on May 20th.

MR. WOLCOTT: Okay.

THE WITNESS: Exactly which were which, it would take some research to find out right now, Mr. Wolcott.

Q. (By Mr. Wolcott) Well, now, you testified on July 2, 1958, and the accident took place on May 20, 1958, is that right, sir? A. That is true. That is true.

Q. All right. That is just an interval of a little over a month and a half, so obviously you were thinking about meetings before the accident unless you can think of any meetings you had in that interval of a month and a half? A. I had meetings—

MR. MUDD: Just a minute. There is no question posed as to that.

Q. (By Mr. Wolcott) Is that right? A. I had meetings with Mr. Wederburn, Mr. Simpcox. I can't remember the other gentlemen's names, but they were in the hearing at the Washington Center, down at the C.A.A.

551 Q. When? A. I cannot remember the point in time.

Q. Yes, but was it before or after the collision? A. It was either before or slightly after the accident.

Q. Yes. A. Well, he discussed the inauguration of a new jet approach into the Baltimore area.

Q. Well, Captain, I read you the statement, and if you like, I will read it again.

Do you state that it had no application, no activities on your part prior to the accident?

MR. MUDD: Just a minute.

Q. (By Mr. Wolcott) You can look at the statement.

MR. MUDD: The witness has already testified that there were meetings before the accident and after the accident, and to what point—

MR. WOLCOTT: I want to get an answer to the question.

MR. MUDD: All right, but let me finish the statement.

552 MR. WOLCOTT: Go ahead.

MR. MUDD: And as to what point of time you have specific reference to, we don't know. I think he amply said he had meetings before and after.

MR. WOLCOTT: Well, you don't know and the witness does not know.

MR. MUDD: Do you mind if I finish, Mr. Wolcott?

MR. WOLCOTT: I want to find out who is testifying here.

MR. MUDD: This man has been testifying since ten o'clock, and you ought to know.

MR. WOLCOTT: I would rather have it from him.

MR. MUDD: And if you listened to the testimony, you would find out that he had meetings before the accident.

MR. WOLCOTT: I heard the testimony, and I asked my question—

MR. MUDD: What is the question?

MR. WOLCOTT: You can ask the Reporter to read it if you want to know.

MR. MUDD: Now, just be quiet, Colonel, until we hear that question.

553 MR. WOLCOTT: You can read the last line of questions back, please.

(Testimony read by the Reporter.)

MR. MUDD: I object because the witness has already stated he had meetings before the accident.

MR. WOLCOTT: I am asking now about that statement.

THE WITNESS: Mr. Wolcott, I don't understand the question.

We had meetings prior to the accident.

Q. (By Mr. Wolcott) With reference to traffic congestion in the Baltimore area, is that correct? That is all I want to know. A. Yes.

Q. All right. Now, do you also know that there had been several aircraft traffic collisions in that area prior to that accident? A. Yes.

Q. All right, when did those traffic collisions take place if you recall? A. I don't recall the exact dates or pinpoint them in time. To pinpoint them in time, I could not

554 do it without any research.

Q. All right, now, other than the rules and regulations that you have mentioned before, did you see any other rules or regulations or orders dealing with the air traffic congestion problem in the Baltimore area insofar as your unit was concerned?

MR. MUDD: May I inquire when now?

MR. WOLCOTT: This all has to do with prior to the accident?

THE WITNESS: Yes.

Q. (By Mr. Wolcott) All right, what were they?

MR. MUDD: Since when, Mr. Wolcott?

MR. WOLCOTT: I don't understand you, Mr. Mudd.

MR. MUDD: Prior to '58 encompasses a long time.

MR. WOLCOTT: Well, we are talking about these meetings and these collisions. What did he do?

MR. MUDD: Your question is not that.

MR. WOLCOTT: I think my question is quite clear, and I will suggest that you listen.

MR. MUDD: I will instruct the witness not to answer the question unless you can let him know the time. I have no objection to him describing any orders, but let the witness know whether it was a year before or two years before. Be reasonable with him.

555

MR. WOLCOTT: I will try to be, and if I were not being interrupted so much, I would get along much more easily.

MR. MUDD: I guess you would.

Q. (By Mr. Wolcott) Take a period of one year.

MR. MUDD: All right.

A. I would say yes.

Q. (By Mr. Wolcott) What were they? A. I am afraid I am lost. Are we talking about meetings or orders. The question is not clear.

MR. WOLCOTT: Could you read that question over again? I can understand why you lost sight of the question, Colonel.

(Question read by the Reporter.)

Q. (By Mr. Wolcott) That is within the last year. A. The last year preceding the accident or within this last year.

MR. MUDD: That is right, preceding the accident.

556

A. Yes.

Q. (By Mr. Wolcott) All right, what were they? A. Well, there were to my knowledge prior meetings with the C.A.A. to discuss the Baltimore Martin approach, and this is a jet approach, a conventional aircraft approach into the Martin Airport.

Q. So there were no other regulations or orders issued? A. I am thinking, Mr. Wolcott. I am not finished speaking.

Q. All right, I beg your pardon, go ahead. A. You are taxing my memory. This is two years ago. I can't remem-

ber exactly whether there was a meeting at Washington called by the C.A.A. at that time to discuss problems, mutual problems in the whole Washington area.

MR. MUDD: Colonel, the question is, as I understand it, not meetings, but whether from May of '57 to May of '58 there were any orders issued?

THE WITNESS: Orders? Locally, yes, sir.

Q. (By Mr. Wolcott) Orders and regulations. That
557 is what I asked you about, what they were.

MR. MUDD: Do you recall any specific orders?

A. The specific briefing orders are set within the confines of various plans for different work. The segregation of our acrobatic flights, the segregation of our continental mission flights, where we take them out over the ocean.

I am speaking there in support of the CONAC training director.

In general, with each briefing there is a description of traffic in the area. I should say briefing, but each traffic meeting, training assembly, there is a flying safety discussion, and many times this was discussed and orders given to be on careful watchout for other aircraft.

Q. And that is all? A. To my knowledge at this time, yes.

Q. Was there any change in any regulation or SOP during that period in order to deal with the problem? A. There were changes in SOPs during that period.

Q. What kind and what were they? A. Mr. Wolcott, I could not answer that question. It is three years ago,
558 and what is the SOP and what the new one said, I could not tell you.

Q. Well, I am asking about substantially to the best of your recollection, Colonel? A. To the best of my recollection, there were changes in SOPs, local SOPs, and there were other instructions given to us by higher authority on congestion, but exactly what they were, I don't know.

Q. What is this high authority that you are talking about, Colonel? A. We received information instructions from various sources, one being the work on flying safety at Nor-

ton Airport Base, which is constantly keeping us up to date on flying safety conditions.

The other is from our wing, the 113th Fighter Wing located at Washington.

The other is through the 14th Air Force, and the Air Force advisor.

The other is, of course, the Continental Air Command.

But we receive information from various agencies
559 and instructions. Generally the instructions come out in the form of regulations and directives.

Q. Well, Colonel, could you furnish us with copies of any regulations or SOPs that had to do with air traffic safety or collision avoidance that were promulgated during the year May 1957 to May 1958?

MR. MUDD: Is that the completion of the question?

MR. WOLCOTT: Yes.

MR. MUDD: You can appreciate, Mr. Wolcott, any operational orders or SOPs or orders that can be made available would depend on a lot of restrictions.

I will say this, that if you in due course will funnel any request through me, I will discuss it with the unit involved and determine whether or not they can be made available.

MR. WOLCOTT: Well, I am making my request now, Mr. Mudd. And I, of course, realize that it would be subject to security or such restrictions.

MR. MUDD: Excuse me just a second.

MR. WOLCOTT: Yes, sir.

(Mr. Mudd and witness in conference.)

560 MR MUDD: Mr. Wolcott, Colonel Kilkowski has advised me that for some of the directives and regulations and so forth which came from the various organizations, such as CONAC that he mentioned—

MR. WOLCOTT: Yes.

MR. MUDD: —Continental Air Command—

MR. WOLCOTT: Yes.

MR. MUDD: —and others would have to be secured through him with the local SOP's Special Agent, where

some of them have been destroyed, and the ones that were in existence at the time we picked up in connection with the CAB Hearing, and they currently have none available which would serve your purpose.

I think I state you correctly, don't I?

THE WITNESS: Basically, yes.

I think, Mr. Mudd, that the various instructions issued probably could be obtained from the historical records of the agencies issuing them.

For instance, Flying Safety comes out with a magazine which they published, which has a lot of this information in it. And we don't necessarily keep that, but I am
561 sure that they could supply it.

Q. (By Mr. Wolcott) Well, Colonel, let us put it this way: Such changes or regulations new regulations, as came into effect during this period, insofar as they affect local flying, were incorporated in the SOP, is that right, sir? A. Not necessarily. They could be. We don't duplicate every regulation. We issued SOPs as needed, but they are not necessarily all incorporated in the SOPs.

Q. All right. I see. Now, Colonel, what regulations, so that we understand each other clearly, what regulations govern a flight of a T-33 taking off, a local flight, VFR, on May 20, 1958?

MR. MUDD: From where?

MR. WOLCOTT: From Martin Field.

A. The Air Force Regulation 60-16 governs the flight.

Q. All right, what others? A. There are other 60 regulations that govern flying.

Q. That governed that flight? A. Other 60 series regulations that govern general flying.

562 Q. I mean that flight. I am talking about that particular flight. A. Well, all those regulations.

MR. MUDD: There are general regulations.

THE WITNESS: 60—

Q. (By Mr. Walcott) All right, if that governs flying, go ahead. I just wanted to get all of that.

Now, what else governed that flight?

A. Our own peculiar operating procedures, which under higher agency can tell us local operating procedure in our own Tower, what we have to do in the Tower. We have supporting standard operating procedures.

Q. What are those peculiar operating procedures that you have mentioned? Are they set out in writing? A. They are in our SOPs.

Q. They are in your SOPs. It is your SOPs. Well, now, what else? A. The SOPs can't change what is written in the regulations. For instance—

563 Q. Colonel, that is not what I asked you to do. All I want you to do is list the designation of the regulations governing this flight. You said the SOPs. You said the 60 series. You said the 60 series and the Air Force regulations. Now, what else? A. I could not begin to enumerate them, but all the Air Force regulations that have to do with the flying of an aircraft and the qualifications of the pilot govern that particular flight.

Q. All right, let me just narrow my question down a little bit more, Colonel. I am now talking about traffic congestion. That is the particular question I am talking about. Now, what regulations governed a local VFR flight on a T-33 taking off from Martin Field? A. I can't remember all of them.

Q. Do the SOPs apply? A. They are not regulations.

Q. Well, Colonel, you are a better lawyer than I am. What did you call them? A. They are exactly what they are called. They are Standard Operating Procedures.

564 Q. All right, let me try again now. What regulations procedures, or orders—is there any other category? Written instructions? A. Directives.

Q. Directives. Anything else? Any rules, manuals, regulations, and so forth—that governed a flight of a T-33 in the local mission take-off, and flying under VFR from Martin Field, with reference to traffic congestion and separation? A. Air Force Regulations.

Q. Is that series 60? A. Series 60, Series 55. I can't remember them, like I say, I can't remember all the numbers.

Q. Well, okay. What else? A. Whatever numbers would apply.

Q. All right, what else? A. The Air National Guard Regulations.

Q. What number? A. They are basically the same numbers.

Q. All right, what else? A. And our local procedure.

565 Q. What is that, SOP? A. SOP, sir.

Q. All right. Now, Captain, what is the air speed of a T-33? A. It varies.

Q. What is the normal cruise speed? A. That question cannot be answered in that manner.

Q. Well, just the best you can. Whatever qualifications you want to put on it is all right. A. You have two questions to me right now. One of them is what is the air speed of a T-33. I will answer that. I will say that it runs between zero and say 500 knots.

What is the normal cruising speed of a T-33 would be dependent upon what your mission was, how far you were going, how high you were flying, what your load was, and so many factors, that I could not begin to give you an answer right now unless you prescribed all the factors, and even then I would have to look in the book to find out what the answer would be.

Q. Well, could you say then, specifically, Colonel, on a local area flight, in the Baltimore area, operating between five and nine thousand feet, with a total flight of say
566 175 miles, scheduled to take about an hour, and say gassed up to an hour and a half, just generally, and you can put in whatever perimeters you like. A. Will you continue to specify the factors in asking your question until we get it nailed down to something I can answer?

Q. I will do the best I can. A. What is the throttle setting?

MR. MUDD: Do you want counsel, Mr. Wolcott?

MR. WOLCOTT: What is that?

MR. MUDD: Do you want counsel, Mr. Wolcott?

MR. WOLCOTT: Mr. Mudd has been appointed counsel.

THE WITNESS: If you will take a reduced throttle setting—

Q. (By Mr. Wolcott) You are talking about the throttle setting in percentages? A. Percentages?

Q. 85 percent? A. Height of climb.

Q. Yes. A. I guess it would come out to—what is
567 the fuel loading? About 200 gallons?

Q. I will get that for you in just a minute. A. You see, Mr. Wolcott, all these things are variable.

Q. Yes. I will be very happy to supply whatever we have here. I am glad you asked that question.

MR. MUDD: Maybe you could shorten it up by asking if he is familiar with the loads carried on the flight, and then ask him on May 20th—

MR. WOLCOTT: I have it right here, and then we will have it all. All right.

Q. (By Mr. Wolcott) I will ask you if you are familiar with the load on the flight in which Captain McCoy was? A. Not particularily.

Q. Well, I have the weight and balance here, which has been marked Passenger Exhibit No. 5. Perhaps that will help you (handing paper to witness). A. It does not, Mr. Wolcott, because the fuel that was used—this is based on the take-off fuel, and the fuel that would be used between this point and that point, any point subsequent to this, would affect your speed.

Q. Yes. A. These are very important factors.
568 They all affect it. And you are asking a question that just cannot be answered simply. And I am not trying to be evasive.

Q. Well, I know you are not, Captain, I appreciate that. Well, can you give me even a complicated answer? It is all right. A. There are power curves, there are weight curves, there are altitude curves. And all these things are variables. You cannot pinpoint exactly what it is going to be unless you know all the variables.

Q. Well, let me ask you this. Under the operation procedures of your unit, did you impose any speed limitations on aircraft T-33? A. The speed limit boundaries are set up in an operation of this kind.

Q. What were they? A. I don't remember the exact higher speed boundary, but I think it is in the neighborhood of 500 knots.

Mr. Welcott, perhaps I can explain it this way.

Q. Yes. A. If you are making an instrument ap-
569 proach, where the purpose of the flight is partially designed to save fuel and extend time.

Mr. Mudd: Did you say where it is not?

The Witness: Where it is.

Mr. Mudd: Where it is.

The Witness: You would fly at a reduced speed, perhaps 180 knots, or even slower in some cases.

Q. (By Mr. Walcott) Yes. A. Now, if you were getting from point to point, you would select your most desirable altitude and desirable cruise setting, and you would probably figure it out to around 370 knots. And if you knew that you had bad weather conditions at your destination and you had sufficient fuel, and you had the speed available, you might try to get there in a hurry.

So these are all variables that cannot be pinpointed. And I do not think any engineer, let alone myself, could give you the exact speed. Speed is a definite value which is a result of so many variables that it cannot be pinned down.

Q. Have you made a lot of local flights in a T-33 in this area, Captain? A. I would not say a lot. I have made some.

570 Q. Have you made a number of them? A. I have made a number of them.

Q. As nearly as you can, Colonel, what has been your average speed when you were on a cruise? A. True speed or air speed?

Q. Well, let us take them both. Take them both. A. Well, again, that varies with altitude. For every thousand—

Q. I am talking about your average. Take your average. A. For every thousand feet that you go up, you get a different variable. You get different speed. And subsequently you get less air force in your pitot tube, which registers at less speed internally.

This is different from your cruise speed, which again is different from your ground speed, because with ground speed you have a wind variable.

Q. All right. A. So I would say that your true speed at normal cruising, which is ninety some percent, and say 25,000 feet, with 200 gallons loading, would probably be in the neighborhood of 350 to 370 knots. Now,—

571 Q. Suppose you were flying under 10,000 or 9,000 under VFR conditions. A. VFR or IFR has no difference in what your speed would come out to be. It is strictly—

Q. Well, I am quite aware of that, Captain, and you don't have to go into an explanation of that. A. I am not trying to be evasive, but I think any engineer—

Q. I am talking about a local flight, a local flight that you may have made under VFR.

THE WITNESS: Mr. Mudd, these questions are just impossible to answer.

MR. MUDD: I think everybody appreciates that.

Q. (By Mr. Wolcott) Such as the flight that Captain McCoy made, have you ever made the type of flight that Captain McCoy testified about? A. Not the identical type of flight, no.

Q. I did not ask you that, whether you made an identical flight. A. I made a local VFR flight. I did not necessarily go out in the same area.

572 Q. That is right, that is right. A. Generally.

Q. Was the local type of flight that he then testified about unusual in your squadron? A. No.

Q. Generally thinking, or relying on your memory, going back to similar types of flight, what was your average speed?

MR. MUDD: I will object.

A. It cannot be answered.

Q. (By Mr. Wolcott) You cannot answer it. All right. A. No.

MR. MUDD: On the ground of immateriality.

MR. WOLCOTT: You have your objection.

THE WITNESS: Mr. Wolcott, I am trying to be helpful.

Q. (By Mr. Wolcott) If you can't remember, all right. A. It is not that I can't remember. The question just cannot be answered.

Q. All right.

MR. MUDD: That is all right. Let it go.

Q. (By Mr. Wolcott) Now, does the pilot in a T-33
573 have excellent visibility all around him. A. The pilot in a T-33 has good, ordinarily good visibility. He does not have excellent visibility all around him, no. The head rest behind him is an obstruction to vision.

Q. Except for that?

MR. MUDD: Go ahead, finish your answer.

MR. WOLCOTT: I am sorry.

MR. MUDD: You mentioned the head rest.

THE WITNESS: The head rest behind the pilot is an obstruction to vision.

Q. (By Mr. Wolcott) But except for that, does he have clear visibility all around? A. Not below him. There are some areas down the side where the visibility is obstructed by the nose of the aircraft.

Visibility is a matter of comparison, too, Mr. Wolcott. I personally consider it good visibility.

Q. Didn't you testify, Captain, at page 430 of your testi-

mony before the Civil Aeronautics Board—I am read-
574 ing from it—"The entire upper portion of the aircraft is a canopy, a clear canopy, and it gives the pilot excellent visibility." A. In that direction, it does.

Q. Just let me finish reading the quotation. A. I am sorry.

Q. "I think without question I would say it is two to three times as good as any transport aircraft."

Now, do you recall making that statement?

A. I think it is a true statement.

Q. All right. Now, if there is a conflict between Air Force Regulation 60 series and Civil Aeronautics Regulation 60, which is the operating rule that would be adhered to.

MR. MUDD: I assume you are talking about in practice and not as a matter of law?

MR. WOLCOTT: That is right, in practice, yes.

A. To my knowledge, in any conflicts between the two, we would abide by the C.A.A.

575 Q. By the way, these Baltimore area collisions that you mentioned, do you know what type of aircraft were involved there?

MR. MUDD: You are talking about the mid-air collisions prior to May '58?

MR. WOLCOTT: That's right, yes.

THE WITNESS: How far back in time?

Q. (By Mr. Wolcott) Well, talking about the collisions that you recalled, how far back in time do they go? A. There was a collision of a Navy aircraft, I don't know the year. My memory does not serve me on exact numbers and types.

Q. By the way, I think it has been testified here that before an aircraft takes off it undergoes pre-flight inspection. What does pre-flight inspection consist of? A. This is a walk-around inspection of the aircraft to inspect the various surfaces and fuel loading caps that could be opened up, oxygen ports that could be opened, the general condition of

the aircraft, and there is other prescribed minor things of various pressure gauges and things like that.

576 Q. In other words, it is just a superficial, in a relative sense, walk-around and the lowest grade of all the inspections as performed, isn't that right, sir? A. I wouldn't necessarily say the lowest grade.

Q. Is there a type of inspection of the aircraft that is more superficial in a relative sense than a pre-flight?

MR. MUDD: I assume you mean performed by personnel of the 104th?

MR. WOLCOTT: Yes, that's right.

THE WITNESS: I don't know of any that is more superficial, if you want to call it that way. It is the pilot's inspection of the aircraft to satisfy him that he knows the condition of it; there is no fuel leaking, no doors that are open on the aircraft. It is generally a superficial like you say, for flight, you might call it. He doesn't go into the engine, and what-not, and check various conditions of it.

By MR. WOLCOTT:

Q. Now, can a member of the Air National Guard be called to service by the Federal Government without draft? A. He can be ordered into Federal

577 service or he can be called into Federal service and there is a distinction between the two. I think you would best go to the law citing this rather than take my opinion, but, as I understand it, a call is a presidential call where he calls the Air National Guard into service. An order is an order ordering the Air National Guard into the Federal service upon declaration of a state of war or upon declaration of a state of emergency by Congress or the President.

Q. Now, are all members of the Air National Guard reserve members of the Air Force?

MR. PETTIBONE: I object to the form of the question. It calls for a conclusion.

MR. WOLCOTT: Will you answer it?

MR. MUDD: Answer it, if you know.

THE WITNESS: The Air National Guard, Federally recognized units and officers and airmen of the Air National Guard as such constitute a ready reserve component of the Air Force. This is different than the Air Force Reserve. The Air Force Reserve is also a reserve of the Air Force and it might be confusing but to clarify, the reserve of the Air Force is composed of two units,
578 the Air Force Reserve and the Air National Guard of the United States.

By MR. WOLCOTT:

Q. Now, Captain—or I beg your pardon. Colonel—off the record.

(Discussion off the record.)

By MR. WOLCOTT:

Q. Colonel, I direct your attention to AFR55-19, and 19A, which has been marked Passenger's Exhibit 8 for identification, particularly paragraph 3 thereof headed: Control of Air Traffic Near Air Fields, and ask you whether the Commander of your unit established procedures to provide controllers with adequate position reports prior to entry of aircraft into control zone or traffic pattern. A. Yes.

Q. When was this done and what form did it take? A. We established our local flying area at Martin Airport and had several meetings with the control tower people of the Martin Airport and set up procedures for departure and entry into that area, prescribed points of call.

Q. The procedures you refer to are the SOPs? A. Yes.

Q. All right. Now, is your unit subject to regula-
579 tion issued by the National Guard Bureau in Washington? A. Yes.

Q. The Secretary of the Air Force? A. Is that a different question or the same one?

Q. Well, I am following that up. It was an incomplete question. You are quite correct.

Q. The orders, the regulations—the regulations that come from the Air National Guard or the National Guard Bureau carry the weight of the Secretary of the Air Force. They carry his: By Order of the Secretary of the Air Force, and they carry the office title of the Department of the Air Force.

Q. In the event of conflict does that have greater weight than your SOPs? A. Yes, our SOPs are local procedures prescribed by the Commander and if there were a conflict with any other regulation, Air National Guard or Air Force, the Air Force or Air National Guard would take precedence.

Q. Well, what are these regulations? Could you give the numbers by which they are designated? I am referring now to the National Guard Bureau regulations or
580 the Air Force regulations? A. I couldn't begin to quote them. I merely say that the Air National Guard regulations contain a listing of all Air Force regulations which are applicable to the Air National Guard. The ANG also supplements those with either changes to those regulations or supplements or new regulations.

Q. Well, is there a general series number or an agency designation? A. They enter all series, various series all the way through.

Q. All right. Now, does the series 40 correspond to the National Guard series 75-16 for ground? A. I am not directly familiar with it. I believe that they are both management regulations of the civilian personnel program, but I am not familiar with the contents of the National Guard regulation you refer to. If it were applicable to us it would come out in the form of an Air National Guard regulation.

Q. But generally they correspond, don't they, basically with one another? A. I can't say because I am not
581 familiar with the contents of the National Guard regulation that you mention.

Q. Do you know a Captain Cutair? A. Cutair.

Q. Cutair? A. Yes.

Q. Thank you. Who is he? A. He is the administrative officer of the State Staff of the Maryland Air National Guard. He works as an Air Technician full time with the State Staff located at the Fifth Regiment Armory.

MR. WOLCOTT: Will you mark this exhibit.

(Document dated 2 February 1960 was marked Passenger's Exhibit No. 12 for identification.)

By MR. WOLCOTT:

Q. Now I direct your attention to Passenger Exhibit 12, which is a letter dated February 2, 1960, from Headquarters Maryland Air National Guard, signed by Captain Francis L. Cutair, addressed to Mr. Buckmaster, in which the following is stated in part: "However, the regulations which govern full-time employees are basically the same for Army and Air," and I ask you if you agree with
582 that statement? A. I can't say that I agree with it because I am not familiar with the National Guard Bureau Regulation 75-16.

MR. WOLCOTT: Do you want to see it?

MR. PETTIBONE: Yes, I would like to. Thank you.

By MR. WOLCOTT:

Q. Under what regulation are you authorized to issue SOPs? A. I couldn't quote you the exact number.

Q. What series, do you know? A. I couldn't quote you that. I'd have to look it up in the index. I think all commands have the right to supplement regulations, such as Air Force regulations are supplemented by CONAC regulations, and what-not, to get them down to the working level, and we do that as a matter of practice and I couldn't quote you the actual authority for it right now.

Q. But is it your impression that under Air Force or Air National Guard regulations you have authority to establish the SOPs? A. We not only have the authority, we have the responsibility. Our inspection Air Force,

which is the 14th Air Force and inspects us yearly,
583 goes into this probably quite thoroughly and require that we have, as they call them in some cases, internal operating procedures and in other cases standing operating procedures.

Q. Now, what is meant by a classified employee? A. To my knowledge, in the sense that we know a classified employee it is a NGC rating. That is a classification that goes with his specific job assignment and these are issued by the National Guard Bureau.

Q. I see. So that a classification is meant what grade rather than in a security sense, is that it? A. I'm afraid I couldn't give you an exact answer.

Q. It is a grade sense rather than a security sense that the term "classified" is used. You understand my question? A. Mr. Wolcott, using the broad term, classified employees, it might apply to various agencies. For instance, the Civil Service and what-not, Air Force civilian program, they probably have the same, but if you could get a specific question into our air technician structure I might answer it.

Q. Well, according to your air technician structure, what is meant by a classified employee? Is that a separa-
584 tion as to a grade or status? A. There are two types of employees; those called classified, which are NGC, and those called, I think they are wage labor board, which are NGMs.

Q. What is NGC again? A. Classified.

Q. What is NGC? What does it mean? What do the initials stand for? A. I believe it is National Guard Classified.

Q. I see. A. I believe.

Q. And what category was McCoy as Air Maintenance Chief? A. As I said, the structure is constantly changing.

Q. I am talking now of May 20, 1958. A. All right. In March of 1958 the structure changed and various NGM classifications were changed to NGML, which is a leader classification and others were changed to NGS, which is

a supervisory classification. Now, Captain McCoy specifically was in a NGS position at the time of the accident.

Q. Now, what is NGMS. What does that mean?

585 . National

586 tion. It is not specific enough to be susceptible of being answered.

MR. WOLCOTT: Well, my questions all apply to the period prior to——

MR. PETTIBONE: Well, I was referring not to the period but the term "Air Force Flying School", which standing alone might mean anything.

MR. WOLCOTT: You know they don't stand alone, don't you?

MR. PETTIBONE: That is the only descriptive phrase that you use in your question.

By MR. WOLCOTT:

Q. Now, did your unit on or prior to May 20, 1958 receive quotas for recruitment for the Air Force Flying Training School? A. The question doesn't have a simple yes or no.

Q. Well, just answer it the best you can, if you will, please. A. The National Guard, Air National Guard Bureau receives quotas for the Flying Training School. The Air National Guard has a system of replacement of pilots whereby they are assigned a quota and the

587 quota is filled from the various states to go into the Flying Training School and subsequently for these pilots to be returned to the states. The only reason that they would not be returned is if they qualified for regular commission they could remain on active duty.

Q. Is that with the Air Force? A. Yes.

Q. And is that Flying Training School operated by the United States Air Force? A. It is; but to answer your question, we did have at the time position vacancies for that flying training. I think it was two. It was either one or two. I can't remember.

Q. I see, and does that request originate with the Na-

tional Guard Bureau in Washington? A. Request for what?

Q. For recruitment to fill those positions. A. The National Guard Bureau doesn't make a request to the State. It assigns us or authorizes us to fill these positions.

Q. I see. A. And the State, through the Air National Guard, makes the selection. These people have to pass the appropriate tests and if they pass, meet the Air Force standards they can go through the school and then be returned to us as Air National Guard Pilots.

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Q. Is that authorization made periodically? A. It is made in accordance with the availability of spaces and also the requirements of the Air National Guard at the time.

Q. Were there any military radar installations in the area which controlled the flight of Captain McCoy on May 20th? A. No.

Q. Were there any that control your flights generally? A. At that time we were a Fighter Interceptor Squadron and we had a requirement to work with the ground controlled interception military sites. This is with the tactical aircraft.

Q. From time to time prior to May 20th, '58 did you receive TWXs or instructions from the Air Force?

MR. PETTIBONE: If that is a whole question I object to the form of it.

589

MR. WOLCOTT: Okay. Will you answer that, please?

THE WITNESS: It is a broad question. We did receive TWXs and instructions from the Air Force.

By MR. WOLCOTT:

Q. Directly? A. Yes.

Q. What was Captain McCoy's combat status, if any, on May 20th? A. On May 20th, as of the date of May 20th Captain McCoy was filling on our military TO, I believe, the position of Aircraft Maintenance Officer and as such did not have a true combat status with the unit.

His only combat readiness requirement would be as a Federally recognized officer of the Air National Guard and as such was a member of the ready reserve.

Q. What was Captain McCoy's status with respect to the United States Air Force? A. Could you be more specific, Mr. Wolcott? I could talk for about a half hour on the relationship between Captain McCoy and the United States Air Force.

Q. Well, why don't you go ahead and tell us about it?

MR. PETTIBONE: Well, I object to the question be-
590 cause it calls for the witness to state what is in effect a legal conclusion.

MR. WOLCOTT: Try it, Captain. I mean Colonel.

THE WITNESS: Captain McCoy had a rating of pilot granted by the United States Air Force, or the Secretary of the Air Force. I am not familiar with exactly who grants the ratings. I shouldn't say I am not familiar with it, but I believe it is the Secretary of the Air Force. He has a requirement to participate in frequent aerial flight, which is an order from the Secretary of the Air Force which is, in effect, a flying status recognized as such. He has, in his maintenance activities, liaison with various Air Force Depots in support of his aircraft. He has the responsibility for, or he had at that time the complete responsibility for the maintenance section, which is subject to United States Air Force scrutiny by 14th Air Force Inspection yearly. He has the requirement for training his airmen in accordance with Continental Air Command directive.

Q. That is United States Air Force? A. United States Air Force. There are the numerous TOs and directives concerning maintenance.

591 Q. TOs are technical orders? A. Technical orders, which are his obligation to carry out. He has the direct tie-in with the Air Force advisor people. They have a maintenance sergeant who inspects the various aircraft occasionally and advises him on the condition of those aircraft.

Q. Maintenance sergeant, what is his connection with that unit? A. He works under Major Britton, the air advisor. He is called also an Air Force advisor and Sergeant airman capacity.

Q. I see, and does he have a regular base at Martin? A. Air Force advisor people are stationed at Martin. They fall under the Headquarters of, or under a unit located at 14th Air Force.

Q. How many people were maintained at Martin? A. At that time there were four.

Q. Four. That was Major Britton. Who else? A. Major Britton and three sergeants. Sergeant Baldwin, Storm and Hoffman.

Q. One was Maintenance Sergeant. What were
592 the duties of the other sergeants? A. One was administration and personnel and the third was support of the limited forecasting flight. He was Air Force observer, weather station.

Q. Could you give us their names so we can get a complete record of their names, please? A. I'm sorry. I don't know their first names.

Q. Okay. That's all right. You mentioned a maintenance sergeant. Does he physically look over the aircraft? A. Under Major Britton's direction he does.

Q. And does he also examine all the maintenance and inspection records pertaining to the aircraft? A. You used the word "all". I wouldn't necessarily say all. He can make spot checks of the maintenance records.

Q. Then you say there is another sergeant that has to do with personnel? A. Administration and personnel.

Q. Administration and personnel. Now, just what does he do? A. He assists the unit in—well, various capacities.

Keeping up with the numerous administrative pro-
593 cedures that we are required to keep up with by regulation. If there is any question of interpretation of how to fill out various forms, and what-not. He also conducts the qualification testing, which is a function of the Air advisor's office to receive the tests and properly

safeguard them and administer them for AFSC qualification.

Q. When you refer to initials I would appreciate your also telling us in each case what it means. A. Air Force Specialty Code.

Q. Well, Colonel, is it correct to say that whenever any person or individual applies for employment as a civilian employee in the Air National Guard or applies for membership in the Air National Guard itself that that is reviewed and first passed upon by the Air Force advisor before the application is accepted? A. No, that is not true.

Q. All right. Now just tell me what part the Air advisor plays in the qualification or acceptance of an employee or a member of the Air National Guard. A. You have two questions there. The employees are examined at the base and are hired by direction of the Adjutant General.

594 The procedure is that we examine an individual for employment and then if he meets the qualifications the Adjutant General is so notified and if he concurs he will cut orders hiring this individual against the demanding document that we are authorized. Now, the military end of it——

Q. Before you get to the military end of it may I ask you this. At any stage do the application papers go across the desk of the Air Force advisor, or he or his staff in any way consulted? A. No. That is not one of their functions.

Q. I see. Now, let's go to the military side. A. The AFSC testing program that I was speaking about that the Air Force, the Air Advisor's office monitors is not an entrance examination. There are tests given to the airmen who desire to get into the organization and if they qualify they are enlisted as airmen into the unit, based on the qualification testing score and also the TO vacancy. Now these orders are a function of the State and——

Mr. Mudd: For the record in this connection you are

using TO not as technical order but as table of
595 organization?

THE WITNESS: Table of organization, yes, I'm sorry. Now, an officer coming into the unit, if he is an Air Force Reserve Officer he makes application and if he meets the qualification he receives an appointment in the unit and his paper work and what-not is sent to the National Guard Bureau for Federal recognition of his position and as such he becomes a member of the Air National Guard of the United States.

Now, the National Guard Bureau can either grant or withhold this recognition, based upon the qualifications that are listed in his record and his previous service.

Q. I see. So that— A. The Air Force advisor's office does not do this.

Q. So that his acceptance is subject to ultimate approval by the Air National Guard Bureau, is that right? A. His Federal recognition, which grants him a military, a Federal status——

Q. Yes. A. —is a function of the National Guard Bureau and I understand the Department of the Air Force.

596 Q. Well, all the members of your Air National Guard Bureau are Federally recognized, are they not? A. Of the Bureau?

Q. I mean of the Maryland Air National Guard. A. That's true. We have in the State a Federally recognized unit and, as such, our personnel have to be Federally recognized.

Q. All right. That means that they are all approved by the Air National Guard Bureau? A. Yes.

Q. All right, and does that also apply to promotions? Do promotions all have to be approved by the— A. That's true, yes.

Q. Now, who grants sick leave of personnel? A. Sick leave is granted by order of the Adjutant General and is strictly an administrative function. The base determines the requirement and administers it and the Adjutant General cuts orders on all leave, all changes of status.

Q. Are civilian employees or military personnel of the Air National Guard permitted to engage in political activities? A. You have two questions again, Mr. Wolcott. If you would ask them separately——

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Q. What about civilian employees? Let's limit it to civilian employees. A. It is my belief that civilian employees are governed by the provisions of the Hatch Act that would prohibit us from seeking public office or engaging in political activities, but I don't believe that applies to the ordinary member of the unit that is not a full-time employee.

Q. What provisions are made for compensation for injury or death while in performance of duties as Air Technicians? A. We are governed under the provisions of the Federal Employees Compensation Act for injury and are so treated at the United States Public Health Hospital in Baltimore.

Q. Is there a special regulation bringing you under that, or is that because you are Federal employees? A. I am not familiar why we are under the regulation. I think it is beyond my knowledge. I merely know that the regulation applies, and we comply with the provisions of it.

598

Q. Well, Colonel, did you, in connection with the injuries suffered by Captain McCoy in this accident, make an application on his behalf for compensation from the United States Government? A. I filled out an application for his admittance into the hospital for medical treatment.

Q. What hospital was that? A. The U. S. Public Health Service Hospital in Baltimore.

Q. Well, is that limited to Federal employees? A. I'm sorry. I don't know who it is limited to. I know that Merchant Marine personnel are covered there, but just who they treat I don't know.

Q. Well, on what basis did you apply to that hospital? A. Under the provisions of the Federal Employees Compensation Act.

Q. Did you also fill out a request for treatment of injury of Captain McCoy under the United States Employees Compensation Act?

MR. MUDD: Different than what you just referred to?

MR. WOLCOTT: Yes. Incidentally, I have a paper here. I am not trying to trap you or——

MR. MUDD: I didn't mean to imply that. I was just trying to keep it straight.

MR. WOLCOTT: Yes, different from the one that he mentioned.

I have handed Colonel Kilkowski a group of papers which have previously been marked Plaintiffs' Exhibit No. 2. I think that is a question.

THE WITNESS: The answer is yes.

By MR. WOLCOTT:

Q. Who is Colonel, is it Ebaugh? A. Ebaugh, E-b-a-u-g-h.

Q. Yes. Who is he? A. He is the U. S. Property and Fiscal Officer for the State of Maryland.

Q. Now I show you a certificate dated May 29, 1958 which is a part of Plaintiffs' Exhibit 2 and ask you if you have seen this or a copy, or the original thereof before? A. I can't recall having seen it.

Q. Well, do you recall whether you were consulted on the drafting of this certificate which states that, over Colonel Ebaugh's signature, that Julius McCoy was working as a civilian employee of the United States at the time of the injury. Were you consulted in connection with that? A. I can't recall whether I was or not.

Q. Well, normally would you be consulted? A. You are asking if I would be normally consulted about something that is not normal.

Q. Well, where there is an application for compensation for injury are you normally consulted in the filling out of the forms by various officers and members of your unit? A. We ordinarily send these forms through the U. S. Property and Fiscal Officer.

Q. Where is he located? A. At Havre de Grace.

Q. Maryland? A. Maryland.

Q. Now where is Colonel Ebaugh stationed? A. At Havre de Grace.

Q. Oh, I see. So they are all together there at Havre de Grace? A. Colonel Ebaugh is the United States Property and Fiscal Officer who is located at Havre de Grace, Maryland.

601 MR. MUDD: Is that the Aberdeen Base?

THE WITNESS: No. It is at the Maryland National Guard installation at Havre de Grace. It is the old race track.

By MR. WOLCOTT:

Q. Now, in making an application for compensation for injuries is it necessary and is it the procedure that the injured party be certified as a civilian employee of the United States at the time of the injury? A. At my level, no.

Q. Well, at any level. At Captain McCoy's level? A. No. If Captain McCoy receives an injury the procedure is that he gives notice to the Base Detachment Commander that he has been so injured.

Q. Yes. A. And we, from our administrative section, fill out the appropriate forms for his correction of his difficulty.

Q. And what forms do you, in your administrative section, fill out? A. Well, there is CA-1, CA-2, CA-16.

Q. Well, if you give me designation numbers they mean very little to me. Tell me what the forms are. A.

602 There is the employee's notice of injury that is turned in by the injured employee to the base.

Q. Is that a notice of injury under the Federal Employees Compensation Act? A. That's true.

Q. And where is that form obtained from? A. It is obtained from our Headquarters.

Q. I see. All right. Go ahead. What else? A. Then the official superior's report of injury.

Q. And is that a notice under the—or report under the Federal Employees Compensation Act? Is that one of the forms? A. It is one of the forms for administration under the Act, yes.

Q. Thank you. Go ahead. A. Then there is the request for treatment of the injured under the U. S. Employees Compensation Act.

Q. And is that one of the forms under the Act, the Compensation Act? A. Yes.

Q. All right. What else? Now, is it further necessary as part of the administrative handling of the claim that he be certified as a Federal employee? A. I do not certify to that.

Q. But that the Bureau, that someone in the Bureau certifies him as a Federal employee? A. I do not know.

Q. But you do know that in this case he was certified as a Federal employee. Is that correct, sir? A. You are showing me a certificate apparently signed by Colonel Ebaugh, U.S.P. & F. O. which so certifies. It is not my function to interpret law.

(Thereupon, the luncheon recess was taken from 1 o'clock to 2:15 o'clock p. m.)

AFTER RECESS

By MR. WOLCOTT:

Q. Does your office maintain a full set of forms for applications for compensation? A. Yes.

Q. That is the Federal Compensation Board, is that right? A. Yes, sir.

MR. WOLCOTT: Will you mark this exhibit, please?

(Document dated 6 November 1957, Letter Orders, was marked Passenger's Exhibit No. 13 for identification.)

By MR. WOLCOTT:

Q. Could you look at that exhibit, Colonel, and I ask what type of duty on the part of Captain McCoy that re-

fers to? A. It refers to duty performed by Captain McCoy for the purpose of ferrying a F-86E aircraft.

Q. Now, what was his status while ferrying this aircraft, and by the way, from what points was this ferry to be accomplished—between what points? A. From Martin Airport, Baltimore, to Van Nuys Municipal Airport, Van Nuys, California.

Q. Now, what was his status while performing the ferry? A. To act as a pilot, to perform the ferry duty. He was ordered to active duty, voluntarily, and with consent of the Governor.

Q. Then he performs this ferry job as a member of the U. S. Air Force, is that right? In other words, was
605 he in civilian status or military status? A. He was in a military status.

Q. And with respect to his military status was he a member of the U. S. Air Force? A. From the order I couldn't rightly say that he was a member of the U. S. Air Force. He was on active duty for the purpose of ferrying an aircraft from Martin Airport to Van Nuys, California, and this is a type of duty in support of the active establishment.

Q. Now, that is an order issued by the Department of the Air Force, is that right? A. Order issued by the Departments of the Army and Air Force, National Guard Bureau, Washington 25, D. C., and attested to by Colonel Cassell, Assistant to the Adjutant General, State of Maryland.

Q. Well, now, under the terms of that order is he relieved of his status as member of the Air National Guard? A. Yes. The order states he is relieved from his Air National Guard assignment prior to the effective date of his active duty to do this ferrying job.

Q. But he is assigned to Headquarters, U. S. Air
606 Force, as a part of the Air Force, is he not, under that order? A. That designates his assignment to Headquarters, U. S. Air Force. I couldn't be justified

in saying whether he was a member of the Air Force at that time. I think that would have to come from higher authority than me.

Q. I see. Now, let me ask you this. Having in mind this type of order, Passenger's Exhibit 13, during a period, say, of the time that you were with the unit, the Maryland Air National Guard unit, had there been similar orders of that type issued with reference to members of the Air National Guard? A. Yes.

Q. Are they fairly frequent? A. This type of order is issued generally when an aircraft has to be delivered from point to point. It is issued in accordance with—I don't know the exact number of the regulation, but I believe it is ANGR—55-08.

Q. So could you fairly say that they are frequent? A. Your use of the word "frequent", I might better explain when it would be used and let you determine.

Q. Well, you have already told us when it is used,
607 Captain, I mean Colonel, but what I want to find out is how often it is used. A. Well, if we don't receive a change of aircraft in the future it would be used rather infrequently, but we have 25 aircraft and if we were to change aircraft and have to move these aircraft out the order would be used 25 times in this case.

Q. But aircraft are replaced from time to time, is that right, sir? A. That is the purpose of this order here. This is a F-86E aircraft which was being replaced by an F-86H and we were instructed to deliver these to a new base and I might add that this order 6 November 1957 predates my association with the unit. At this time I was at Harbor Field and Commander of the 135th Air Resupply Group at this time.

Q. Well, I am talking now about the procedure. Now is that the procedure that is usually followed in connection with ferrying aircraft, that the status of the Air National Guard Officer reverts to Air Force status? A. At the present time I believe the correct terminology is active duty, Federal.

608 Q. But at that time. I am talking about prior to May 20, 1958. A. I couldn't be sure.

Q. Is that the type of order that was usually cut in connection with ferrying aircraft? A. Yes, sir, it is.

MR. PETTIBONE: Can we see the order, please, Mr. Wolcott?

MR. WOLCOTT: That was one of the papers that was produced by the Government in connection with the order for production of papers in the Morgan case. Major Prince is familiar with that and, incidentally, while we are at it, I am going to request a stipulation from the Government, Mr. Pettibone, to the effect that all papers which were produced by the Government in the Morgan case be deemed to have been produced in all of the cases that are titled in this deposition so we don't have to go through a formality of taking each one and marking it in all the cases.

MR. PETTIBONE: Well, can you do that? Can you so stipulate in cases where you are not counsel yourself?

609 MR. WOLCOTT: Well, I am requesting it in all cases in which I am counsel and I imagine that Mr. Kieffer is going to request it in cases in which his firm is counsel.

MR. KIEFFER: And Mr. Davidson from Chicago.

MR. WOLCOTT: And, of course, Davidson. Well, that applies to the Gliedman matter, because I am counsel in there.

MR. PETTIBONE: We can do that all right. We will do it. Of course, I was just wondering what was the best procedure.

MR. WOLCOTT: Well, I think we stipulate right here. There is a record and all the cases are titled here so that this is as good a place to do it as any.

MR. PETTIBONE: You are referring now to only those documents and papers which were turned over to you as counsel for the plaintiff in the Morgan case in the Eastern District of Brooklyn.

MR. WOLCOTT: That's right.

MR. PETTIBONE: In response to your motion to produce.

MR. WOLCOTT: That's right.

MR. PETTIBONE: All right. The United States will so stipulate.

610 By MR. WOLCOTT:

Q. I show you this paper which is one of those produced by the United States Government in the Morgan case and I ask you to identify it, please.

MR. PETTIBONE: Do you want to mark it?

MR. WOLCOTT: I will mark it, yes.

(Documents were marked Passenger Exhibits 14-A, B and C.)

MR. MUDD: Do you have extra copies of the papers you are now offering?

MR. WOLCOTT: No, I don't. The government has it. You can get it from the Government, Mr. Mudd. I was just furnished with this copy.

MR. PETTIBONE: What is it, by the way?

MR. MUDD: USAF Officer's Effectiveness Report.

By MR. WOLCOTT:

Q. Could you tell us what these are? Identify them, please. I am talking about the typed report now, not what is in them. A. This is the Air Force Form 77, U. S. Officer's Effectiveness Report. There appear to be three copies of this, or three different reports; titles changed here (indicating).

611 Q. By "USAF Officer", does that mean United States Air Force Officer? A. United States Air Force Officer Effectiveness Report.

Q. All right. I notice that all of these are signed by Edwin Warfield. Is that name familiar to you? A. Colonel Warfield is the now—is the Chief of Staff of the Maryland Air National Guard.

Q. During the period January 25th to August 30th, 1953,

was Captain McCoy a member of the 104th Fighter Squadron? A. Yes, sir.

Q. And during the period June 27, '54 to July 23, '55, was he a member of the 104th Fighter Interceptor Squadron? A. Yes, he was.

Q. And during the period August 9, 1953 to June 26, 1954 was he a member of this Squadron? A. Yes, sir.

Q. Now, who is Stanley Sanders or Saunders? A. Major Saunders was formerly Base Detachment Commander of the Harbor Field installation and at one point in time was Operations Officer of the 104th Fighter Squadron.

612 Q. What is the purpose of these effectiveness reports, and who makes them, and where are they sent? A. The effectiveness reports are filled out at unit level and sent forward in three copies. In the case of Air National Guard Officers the one copy is retained in the Adjutant General's office, one is sent to the National Guard Bureau. The other is retained at Headquarters, U. S. Air Force.

Q. Well, this form, Effectiveness USAF Officer Effectiveness Report, is an Air Force Form, is it not? A. Yes, sir.

Q. And pursuant to what regulation is that form filled out and sent? A. I don't know the exact number.

Q. Well, what series? Is it Air Force, or what? A. I don't recall the series. I believe it is governed by Air Force Regulations.

Q. Are you familiar with the Federal Employees Regulations contained in the Federal Personnel Manual? A. I might not know the title, the manual by that name.

613 Q. Well, I am referring to the Federal Personnel Manual, the S658. Does that mean anything to you? A. No, sir, it doesn't.

Q. Well, you take a look at this manual and see whether you can identify it. A. I am not familiar with this manual. The manual for governing of our Air Technicians employed is Air National Guard Manual 40-01.

Q. Well, are you familiar—have you at any time concerned yourself with the Federal Employees Regulations?

MR. MUDD: Is that a given number regulation you are speaking of, or a series, Mr. Wolcott?

MR. WOLCOTT: I think it is a general category, Mr. Mudd.

THE WITNESS: No, sir. The regulations for our use are the ANGR Regulations in the 40 series which govern civilian personnel.

Q. Now, prior to this accident, Colonel, how many operations did you have weekly in your squadron? A. As near as I can remember, approximately 100. Mr. Wolcott has refreshed my memory through information
614 previously given at another hearing where it was shown that an examination of the record showed that there was 75 flights per week.

Q. I think you checked your record actually and furnished that information. A. That is true.

Q. Now, what proportion of this takes place on weekend and what proportion takes place on week days?

MR. MUDD: Excuse me. What period of time are we referring to now, Mr. Wolcott?

MR. WOLCOTT: I am referring to time before May 20, 1958.

MR. MUDD: Would you say within, say, a six month period before?

MR. WOLCOTT: Well, Colonel Kilkowski checked the records, and let him furnish the period of time.

MR. MUDD: Well, then I think it is fair to ask him——

MR. WOLCOTT: Now just a minute, Mr. Mudd.

MR. MUDD: All right. Then I am going to object to the question.

615 MR. WOLCOTT: I gave him complete information. This is ridiculous. Well, you go ahead and object.

MR. MUDD: And I am going to instruct him not to answer.

MR. WOLCOTT: We will go right down to Court and find out whether he can answer. I gave him all the information.

MR. MUDD: I am asking you to let the witness know what

period of time you are talking about, or to let him refresh his memory.

MR. WOLCOTT: Look. If I go out of my way to supply the information you don't like it.

MR. MUDD: Of course I do.

MR. WOLCOTT: All right. Now that is exactly what I did here and you are just making it difficult.

MR. MUDD: Just a minute now. You just keep quiet, Colonel, until we get this straightened out.

MR. WOLCOTT: We will go down to Court and straighten it out, if you'd like to.

MR. MUDD: All right. If you'd like to go right now we will go right now. It is up to you.

MR. WOLCOTT: Well, a couple of questions and
616 then if I don't get a satisfactory answer then we will go.

By MR. WOLCOTT:

Q. Now, Colonel, I showed you a transcript of testimony you gave on a hearing before a subcommittee of the Committee on Government Operations in the House of Representatives. Is that right, sir? A. That is true.

Q. All right. Now, were you asked there to obtain certain information with respect to the number of operations that you made weekly, your Squadron, and the number of weekends and the number of week days? A. That's true.

Q. All right. Now, did you cover any particular period of time in compiling that information?

MR. MUDD: You refresh your memory by looking at that.

By MR. WOLCOTT:

Q. I ask you in compiling the information what period of time you covered.

MR. PETTIBONE: In view of the fact the witness is apparently going to refresh his recollection from a printed document that he has been handed I'd like the record to disclose what the document is.

617 MR. WOLCOTT: I just read it. The record discloses it.

MR. PETTIBONE: Is that the record you read?

MR. WOLCOTT: Yes.

MR. PETTIBONE: I'm sorry.

THE WITNESS: In the hearing in the committee on Federal role in aviation the question was asked of our flights per week. We told them it was approximately a hundred hours per week and 50 percent were on weekends and 50 percent during the week. They asked us to furnish accurate records for the period 1 January——

MR. MUDD: All right.

THE WITNESS: ——through May 22, 1958, which we subsequently supplied and it turned out that there had been an average of 75 flights per week and that 49 percent of these flights were made on weekends and 51 percent during week days, and Saturday and Sundays were considered weekends.

MR. WOLCOTT: Thank you.

By MR. WOLCOTT:

Q. With respect to your job in civilian capacity did you come under any Civil Service Rules or Regulations?

618 A. To my knowledge, no.

Q. In your Civil Service capacity I think you testified that you are prohibited from engaging in political activities. Is that right, sir? A. To the best of my knowledge the Hatch Act does apply to our employees.

Q. Well, is that in connection with your Civil Service status? A. We do not have a Civil Service status, Mr. Wolcott. I said my understanding was that the Hatch Act applies to us in our employment as Air Technicians.

Q. You mean as Federal employees, is that it? A. As Air Technicians. We are employed as Air Technicians. It is a description given in the regulation and it is the only description that I can give you.

Q. Colonel, is there any regulation governing the amount of reserve fuel a flight must have on a local VFR flight?

I am talking as of the time of May 20, 1958. A. Yes, sir.

Q. And what regulation is that?

MR. MUDD: Is that, or was that?

619 MR. WOLCOTT: Was that. Thank you.

THE WITNESS: I believe it is 60-16.

By MR. WOLCOTT:

Q. Is that an Air Force—is that Air Force? A. Air Force Regulation 60-16. I might add we had supplemented that with our local SOP at Martin requiring in the T-33 aircraft 100 pounds—100 pounds of fuel on initial approach for landing and 1000 pounds in the F-86H.

Q. Well, that, Colonel, is an additional requirement and does not—— A. This is more stringent than the Air Force Requirement that we had put on locally.

Q. It doesn't supplant the Air Force Requirement, but it is in addition to it and makes it more stringent? A. Yes, sir.

Q. Thank you. Were Sergeants Nolan, Thomas, and Feidler, civilian personnel at the base? A. They are hired as Air Technicians and were at the time of the accident.

Q. You said they are technicians and they were deemed civilian personnel, is that right? A. They were full-

620 time employees, air technicians; civilian personnel. Use the terminology you wish. They were full-time employees of the Maryland Air National Guard at the time.

Q. And they were in the civilian personnel category? A. Yes.

MR. WOLCOTT: That's all. Your witness, Mr. Pettibone.

MR. PETTIBONE: Thank you, Mr. Wolcott.

MR. WOLCOTT: I'd just like to ask one question.

MR. PETTIBONE: Certainly.

By MR. WOLCOTT:

Q. Colonel, was Captain McCoy suspended from flight duty at any time?

MR. MUDD: Objection, unless the question is directed to a specific time before the accident.

By MR. WOLCOTT:

Q. Was he suspended from flight duty at any time before the accident that you know of? A. To my knowledge, no.

Q. Was he suspended from flight duty at any time after the accident?

MR. MUDD: Objection.

621 MR. WOLCOTT: Will you answer that, please?

MR. MUDD: Go ahead and answer it.

THE WITNESS: As a result of the accident, well—yes, I should say, but—if that is satisfactory.

By MR. WOLCOTT:

Q. Well, you started to say "as a result of the accident".

MR. MUDD: Well, he has answered the question.

MR. WOLCOTT: I know.

By MR. WOLCOTT:

Q. Now was that as a result of the accident, Colonel?

MR. MUDD: Objection. Same is immaterial.

MR. WOLCOTT: All right. Will you answer that, please?

THE WITNESS: Captain McCoy was relieved of his responsibility for flight duty because of injuries that he received in the accident and has never returned to flight duty. His injuries, which took quite a long time to heal, particularly his hands, prevented him from flying duty for a considerable period of time and subsequently to that he has requested voluntary release from flying duty, which the Air Force has granted and through their order has been

622 released from flying status.

By MR. WOLCOTT:

Q. Did you or any officer in your unit have any conference with Captain McCoy with respect to his fitness, apart from physical, for flying duty?

MR. MUDD: Is this subsequent to the accident?

MR. WOLCOTT: Yes. I am talking now about his suspension from flying duty.

MR. MUDD: I object and instruct the witness not to answer that.

MR. WOLCOTT: On what ground?

MR. MUDD: Completely immaterial.

MR. WOLCOTT: That is no ground.

MR. MUDD: It has no relevancy and is prejudicial to Captain McCoy.

MR. WOLCOTT: It is up to the Court whether it wants to admit that. That is no objection.

MR. MUDD: In my opinion it is, Mr. Wolcott.

MR. WOLCOTT: Do you still persist in that?

MR. MUDD: That's correct.

MR. WOLCOTT: I see.

By MR. WOLCOTT:

623 Q. Has the National Guard Bureau issued any recomendation or directive with respect to his fitness to resume flying? A. There was no recommendations from National Guard Bureau nor the Air Force.

Q. Nor from the Air Force? A. To my knowledge, no.

Q. Was there any recommendation from any Government source?

MR. MUDD: Objection. Just a minute, Colonel. I am going to instruct the Colonel not to answer that. He has explained the reason why Captain McCoy is not flying today and I think that is sufficient, and I don't even think that part of it is material to any relevant issue in this case and any answer given in any further elaboration may or may not be prejudicial to Captain McCoy and I, therefore, instruct the Colonel not to answer.

MR. WOLCOTT: Well, I am asking the question, Mr. Mudd.

MR. MUDD: I understand.

MR. WOLCOTT: To find out whether any agency of the Government——

624 MR. MUDD: I understand.

MR. WOLCOTT: —had anything to do with the fact that Captain McCoy is no longer on flying duty.

MR. MUDD: I know your question has——

MR. WOLCOTT: That has nothing to do with Captain McCoy personally.

MR. MUDD: —has a purpose over and above the personality of Captain McCoy. I understand the reason for the question. I think you understand the reason for my instruction to the witness.

MR. WOLCOTT: Yes, I do. Well, I understand the reason. I can't say that I agree with it, but I understand it.

MR. MUDD: I wouldn't expect you to, but I have got to stand on that. I know why you want it.

MR. WOLCOTT: All right. That's all.

EXAMINATION BY MR. PETTIBONE.

Q. Colonel Kilkowski, I believe you testified that on May 20, 1958 you had a dual status in connection with the 104th Fighter Squadron. In one capacity you were the Detachment Commander and in the other capacity you were
625 an Air Technician employed as a Base Detachment Commander, is that correct? A. Yes, sir.

Q. Now referring first to the prior, the first of those two categories. You held the position of Detachment Commanding Officer by virtue of your rank in the Maryland Air National Guard; that is, your rank of Lieutenant Colonel, is that correct? A. No, sir. You referred to the first but then you said the second.

Q. Oh, did I? I'm sorry.

MAJOR PRINCE: It was misstated from the beginning.

THE WITNESS: If you will correct the question.

MR. PETTIBONE: Let me withdraw the whole question and start over.

By MR. PETTIBONE:

Q. Were you designated Commanding Officer of the Department by virtue of the fact that you were the senior officer in rank in the unit? A. No, sir. I was designated the Base Detachment Commander by virtue of my selection of the Adjutant General of the State of Maryland to

not—with any connection with the 104th Fighter
626 Squadron, but by virtue of being the head of the entire base there.

Q. Yes. Now you used the term Base Detachment Commander. That also is the same title that refers to your employment as an Air Technician? A. That is the only title, yes.

Q. That is the only title. Is the title the same in your other capacity; that is your military capacity at that time and on that day? A. No, sir.

Q. Or can we use a different term to differentiate? A. The term in the military title was Commanding Officer of the 104th Fighter Interceptor Squadron.

Q. Yes. That is what I am getting at. All right. Now, as Commanding Officer of the 104th, was it called Fighter Interceptor Squadron at that time? I am only referring to this one day now. As Commanding Officer were you the senior officer— A. Yes, sir.

Q. —in the unit on that day? A. Yes, sir.

627 Q. Was Captain McCoy one of the other officers of the Maryland Air National Guard assigned to the unit in question in the Squadron on that day? A. Yes, sir, he was.

Q. How many officers were there assigned to the Squadron on that day; I am talking about military officers holding military rank in the Maryland Air National Guard like you and Captain McCoy. A. I can only give it to you approximately.

Q. Well, that will be all right, approximately. A. Forty-five to fifty.

Q. Some of those officers, some of those forty-five or fifty officers were pilots or had flying status? A. Yes, sir.

Q. You had such a flying status? A. Yes, sir.

Q. And so did Captain McCoy? A. Yes, sir.

Q. How many—approximately, at least how many of the others held a flying status? A. Approximately thirty-five:

628 Q. Now, did all of the officers who held, of the approximately thirty-five officers who had flying status prior to May 20, 1958, perform training proficiency flights from time to time with aircraft assigned to the Squadron? A. Yes, sir, all of them.

Q. Now, Captain McCoy, as such an officer, was also employed as an Air Technician by the Squadron, as we all know. That is correct, is it not? A. No, sir. He is not employed by the Squadron. He is employed by the Military Department of the State of Maryland.

Q. Well, all right. Then he is employed by the Military Department of the State of Maryland. Were some of the other officers—well, you yourself also were employed as an air technician by the military department of the State of Maryland on that day too? A. Yes, sir.

Q. And had been prior to that? A. (Nods head affirmatively.)

Q. Now, were some of the other officers who had flying status likewise employed by the military department
629 of the State of Maryland as Air Technicians assigned to this Squadron on that day? A. Yes, sir.

Q. About how many? Can you tell us? A. Approximately six, to the best of my knowledge.

Q. All right. So there must have been approximately 29 others then who were officers then on flying status but were not employed as air technicians, approximately 29? A. Approximately, yes, sir.

Q. Now, on May 20, 1958 you authorized Captain McCoy to make a training proficiency flight of approximately one hour's duration? A. Yes, sir.

Q. Prior to May 20, 1958, had you authorized the approximately five other officers who were employed as air technicians to make similar training proficiency flights of approximately the same duration, or similar proficiency training flights? A. Had taken proficiency flights, and other types of flights, too.

Q. Yes, and with respect to the approximately 29
630 officers who were not employed as air technicians had you authorized them also to make proficiency training flights similar to the one made by Captain McCoy on May 20, 1958? A. Yes, sir.

Q. Was there any requirement that in order to make a training proficiency flight one had to be employed as an air technician? A. In the Squadron in general, no.

Q. Now, referring to your other capacity on May 20, 1958, you yourself were employed as an air technician under a job title which has been referred to here as Base Detachment Commander. Did you perform the duties described under a position labeled Base Detachment Commander, as set forth in Air National Guard Manual 40-01, on page 23 thereof. I will show you. It is dated March 1, 1958, and job title at the top in large letters is stated to be Base Detachment Commander. The job number is 00-00, or 00-01, or 00-02. To assist you in answering this question I will hand you a copy of the manual and the page which I referred to, which you can look at before you answer it.

MR. WOLCOTT: I ask that that volume be marked
631 for identification, please. That doesn't mean he is going to retain it, just to mark. I'd like that marked.

MR. PETTIBONE: Well, that's all right with me.

(Manual was marked United States Exhibit No. 11 for identification.)

MR. WOLCOTT: Does that also say on Exhibit 11 on the cover, Department of Air Force, National Guard Bureau. That is stated on there, and across the middle of it, Civilian Personnel Manual, and there is a seal, Department of the Army and Air Force, National Guard Bureau, 1 March 1958. Is that right, Mr. Pettibone?

MR. PETTIBONE: Yes, that's right.

There is a question before you. Do you recall it, Colonel

Kilkowski, after all this time, or shall we have it read to you now?

THE WITNESS: Yes, sir.

MR. PETTIBONE: That is your answer?

THE WITNESS: That is the answer to the question. I'm sorry.

MR. PETTIBONE: May I have that manual back, please?

632 By MR. PETTIBONE:

Q. Who had actually employed you to fill this position? Do you remember the name of the person who actually employed you? You previously said the Adjutant General of the State of Maryland. Did he do it individually, or did someone by designation do it for him? A. I was recommended for the position by the Chief of Staff, Maryland Air National Guard, and the Adjutant General actually approved it and cut the orders.

Q. All right. Do you remember who the Chief of Staff was at that time? A. Colonel Warfield.

Q. Now, one of the air technician employees who you supervised in this position was Captain McCoy. A. Yes, sir.

Q. Had you recommended him for employment in his air technician position, or had someone else done that? A. Someone else had, apparently. He was—I might explain. He was not hired while I was the Base Detachment Commander of the unit.

Q. You mean he had been employed prior to the time when you became Base Department Commander?

633 A. No, sir. At the time of his employment I was an operations officer of the unit, not Base Detachment Commander.

Q. Well, then you subsequently became Base Detachment Commander? A. Yes, sir.

Q. So that actually he was employed in air technician status before you became the Base Detachment Commander? A. Yes, sir.

Q. So that when you did take over as Base Detachment Commander in this position he was one of a number of employees regularly employed there at that time? A. Yes, sir.

Q. About how many employees in all did you supervise in this position, approximately? A. The authorization is for 119 under me, or 120 total.

Q. But only a few of those, I take it, worked at aircraft maintenance duties of one kind or another, or things related thereto? A. No, sir. A good portion of them worked in aircraft maintenance duty.

Q. Oh, many of them do. About how many would
634 you say? A. This is an approximation, but approximately seventy. Excuse me. I should correct that. Aircraft maintenance is approximately 57. There are other associated maintenance fields which is hard to divorce from aircraft maintenance, such as motor vehicle, armament, and what-not, but the direct aircraft maintenance field is approximately 57.

Q. I see. In other words, the maintenance group generally, as you described it, would be the largest single group of your employees? A. Yes, sir.

Q. Now, as Base Detachment Commander did you establish the working hours for these other employees and particularly the maintenance technicians? A. The working hours are established by the Adjutant General and as the Base Detachment Commander I am obligated to carry those out and also make any recommendations for changes.

Q. Well, does the Adjutant General of the State of Maryland state what days people will work and what hours they will come to work, and that sort of thing, or
did you do that? A. As a matter of administration
635 I do that as Base Detachment Commander.

Q. Yes. In other words, the Adjutant General of Maryland prescribes in general the work week? A. Yes, sir.

Q. And then the actual details of how it is carried out will be a matter for your administration? A. That's true.

Q. Now, as part of your supervisory responsibility in that manner did you cause time and attendance records to be kept— A. Yes, sir.

Q. —of the employees? A. Yes, sir.

Q. Describe briefly and in a general way the nature or kind of records which you kept that related to the time and attendance for work purposes of the air technicians assigned to the Squadron. A. We have the roll of the air technicians assigned, which is maintained in our administration. The personnel report for work. The large majority of the people, other than the officers, stand
636 a formal roll call and the officers——

Q. You mean they stand formal roll call at a certain hour in the morning, as when they came to work. Is that what you mean? A. Yes, sir, roll is at five minutes to eight.

Q. What do you do? Line them all up? A. No, sir. We have—everyone reports to the large meeting room. They are seated until the roll call and then any general announcements of the day are given to them at that time.

Q. I see. That applies to all other than those who also happen to be commissioned officers? A. The commissioned officers roll is taken separately. We do not require that they stand roll call. They are chargeable with their attendance by the person who keeps the roll. There are so few of them, he checks very quickly whether they are present.

Q. Actually though I think you said before there were six of them, did you not? A. All told we have approximately—the time in question I think there were, all told, eight officers.

637 Q. Of whom you yourself were one? A. Yes, sir.

Q. Did you keep the same time and attendance records, the same general kind of records for the officers, the same as the non-officers? A. Yes, sir, identical.

Q. Would the record on any individual show whether he had worked on any given day? In other words, were these records kept on a weekly basis, or a monthly basis, perhaps? A. Kept on a—over a payroll period.

Q. On a bi-wekkly basis, in other words? A. At that time it was a bi-monthly—semi-monthly.

Q. Semi-monthly? A. At the present time it has since been changed and it is a bi-weekly basis.

Q. Well, then, you could inspect your records at any time for any given individual with respect to any given day to ascertain whether or not he had worked on that day, could you not? A. Yes, sir.

Q. And would the record also disclose how many
638 hours he worked on that day? A. Yes, sir.

Q. Did the air technicians employed by the unit have to work a certain number of hours per week? Was it computed on an hourly basis? A. Generally computed on requirement to work forty hours per week. There are times when things occur which would require a greater period of time and compensatory time off for the time that they put in the greater period of time. Emergencies that might occur; other things, such as we have right now. We have a TO modification that requires that we work 24 hours a day in order to accomplish this emergency TO on the aircraft, so we have to make adjustments in the work week periodically to take care of these things; but normally if there is no outstanding emergency the work week is Tuesday through Saturday and altered if we have a training assembly on the Saturday that people will work the following Sunday or Monday to make up for that time.

Q. Did it ever happen that any of the air technicians employed by the Squadron during normal working hours
for the performance of their air technician job duties
639 used some of the time on a day to perform military duties in connection with their status in the Maryland Air National Guard? A. Yes, sir.

Q. And how did you mark their time and attendance records when such things as that happened? A. There are two authorized ways of getting, performing, as you say, additional military duty, which I refer to as flying training periods right now.

Q. Yes, All right. A. Or active duty, such as Mr. Wolcott——

Q. Yes. A. —or any other duty that requires that you not be paid the dual status. The individual has to go on annual leave or to be working on compensatory time basis where they, as an example, let us suppose an individual is scheduled for evening work that we have to do in order to support our evening flying operations. Well, locally his work schedule would be altered from perhaps one o'clock in the afternoon until nine in the evening to support those flying schedules. There is nothing to preclude his coming down at that time and on his own time and avail himself of a flying training period, which is a four-hour
640 period. The only provisions is that you cannot be present for both duties at the same time, can't be present for air technician duty and be in a pay status in a military one too.

Q. In other words, at any given moment you have to be in either one status or the other, but you can't be in both of them at the same moment? A. You can be in both of them at the same moment.

Q. Well——

MR. WOLCOTT: Please. Just a minute. Let him answer the question.

MR. PETTIBONE: All right. Go ahead. I didn't mean to cut you off.

THE WITNESS: At the time of field training you get what is known as fifteen days military leave where you are being paid from both sources.

By MR. PETTIBONE:

Q. Yes. That is what I was about to interrupt you to inquire. Now, let's take a proficiency training flight of one hour's duration to be made during the course of a normal work day for an air technician. Supposing he decides to make a proficiency training flight for one
641 hour commencing at ten o'clock in the morning on a work day and you authorize and approve it as a

proficiency training flight and then he goes and makes the proficiency training flight for one hour. How do you mark his time and attendance records with respect to that hour in connection with his employment as an air technician? A. Well, if he were flying in an air technician status his time and attendance would be marked present. Now, if he were availing himself of the flying training period that is authorized he would either have to work the four hours or go on a leave status for that period of time. The flying the aircraft doesn't have anything to do with the status that he is in. The individual flies the aircraft by virtue of the orders that he has been given and he can fly the aircraft in many statuses, five to be exact, and this has no bearing on any record that is kept as far as flying time is concerned, if he——

Q. No, I am not——

MR. WOLCOTT: Please. Please let him finish his answer, and then you ask another question. Go ahead.

MR. PETTIBONE: Well, he is going on.

642 MR. WOLCOTT: Well, that's all right. Let him go on.

THE WITNESS: I think there is a point of confusion.

MR. PETTIBONE: I don't mind. Go right ahead.

THE WITNESS: There is two separate and distinct pay statuses that we have. One is a military. One is as air technician. They cannot be intermingled. If a man is being certified to time for military duty at that time he cannot be in an air technician pay status. If he is in an air technician pay status he cannot be in the other status; but neither of these statuses has any bearing on the fact of whether he is flying or not. The flying is separate and distinct.

Q. Well, now, you mentioned an air technician flying in an air technician status. Under what circumstances does an air technician, or can an air technician fly, befflying in an air technician status, as you use that term in your answer? A. Whenever he has his order or has a requirement to fly in support of any mission that we have, or in

support of his own personal proficiency. I will take
643 an example and explain.

Q. Yes, go ahead. A. At the present time we have been requested by the National Guard Bureau to fly radar missions for the Aberdeen Proving Ground, which we do. Now, you wouldn't find in the job description anywhere it says to fly radar missions for Aberdeen Proving Ground, yet we have that requirement and the individuals that we have hired have to fly in order to carry out this requirement. The manual that you are referring to there has no jurisdiction over flying status, yet it refers to flying status as being desirable in some cases, mandatory in others, but this flying status that that manual refers to is the Department of Air Force flying status, because there is only one. There are no two flying statuses; one distinct flying status that can be performed in four or five different pay statuses. Two men on the same mission can be in two different pay statuses, and I will give you an example there. We have pilots that get into the organization and they are authorized eight days active duty to familiarize themselves with the equipment. We have flying training supervisors that are assigned to teach them how to fly and familiarize
644 themselves with the equipment. So two men go up on the same mission. They are both flying in their flying status, yet one is an air technician, the other is in military status. Now, the next day this man might, that is flying in a military status, might exceed the authorized limitation of his days per day and he might be flying next to this air technician in the status without pay, but this has no bearing whatsoever on flying status. If that is confusing to you, it is confusing to everyone.

Q. No, I believe I understand it pretty well. Let me just ask you a couple other little details which I'd like to bring out to get clear. Now, as the Commanding Officer of the Squadron as well as Base Detachment Commander in your other capacity you can utilize then any personnel assigned to the unit who are available and have flying

status to perform flying to accomplish any mission which the unit or Squadron may have? A. Yes, sir.

Q. In your discretion. Now, in other words, that would be a flight made pursuant to your direction for the purpose of accomplishing the units mission. That is what
645 we mean by that, isn't it? A. It is the purpose of accomplishing the unit mission and also the accomplishment of air technician work requirements.

Q. Yes. I mean there are some requirements that have been placed upon the unit by some authority to do something and to accomplish it you have to have flying performed by some people? A. Yes, sir.

Q. So under those circumstances you utilize anyone there in your discretion who has the flying status that is needed in order to perform the flight? A. Yes, sir.

Q. Now, then, that of course would be different, a different purpose, a flight made on that basis then would be made for a different purpose, would it not, from a flight that an individual pilot elected to make himself for his own, to improve his own flying proficiency. Now I realize that sometimes they could overlap so that you could have it both ways. It might coincide both ways, but to keep the distinction clear——

646 MR. WOLCOTT: Now are you discussing this with the witness or submitting a question?

MR. PETTIBONE: I am just trying to form a question that is clear enough for him to answer.

MR. WOLCOTT: I object to that.

MR. MUDD: I think it is all right.

MR. WOLCOTT: In my case you find it perfectly all right, Mr. Mudd; rather in Mr. Pettibone's case, but I didn't find that true when I put the questions. Now I insist that the questions be put as questions.

MR. PETTIBONE: Well, they all have been questions so far.

MR. WOLCOTT: Except that one.

MR. PETTIBONE: I didn't finish it.

MR. WOLCOTT: I thought you had a question. Now you

have a discussion and now you are back in the question part of it again. Maybe you can restate it.

MR. PETTIBONE: No, I am not on the question now. This seems to be a discourse on the side we are having here.

MR. WOLCOTT: I am talking about your discourse and your question.

647 MR. MUDD: I am glad you are paying for the original.

MR. WOLCOTT: I am not paying for the original.

MR. PETTIBONE: Well, I think I am going to have to start over because I can't remember where I left off in the middle of that one now.

MR. WOLCOTT: You just put it in question form and I won't object to it on that ground anyway.

MR. PETTIBONE: Well, if the Reporter could go back——

(Question read by Reporter.)

MR. PETTIBONE: The balance of it is this. There is a difference——

MR. WOLCOTT: I suggest you restate your question.

MR. PETTIBONE: Yes. I agree. By now I agree.

By MR. PETTIBONE:

Q. Were there flights made by pilots of the Squadron at their own request or application to you for the sole purpose of improving or maintaining their own flying proficiency? A. The pilots don't arbitrarily do it at their own request. The pilots receive their directions as to what they must fly. You are speaking about the weekend pilots
648 now, I imagine, not about the full-time pilots. There is a distinction between the two. You made yours. I am asking a question.

Q. I didn't realize I made the distinction. Would you—I am not sure I realize what you mean. Maybe you better explain that too. A. We have pilots that are not air technicians.

Q. Oh, are they what you called weekend pilots? A. I am using the word weekend pilots.

Q. That's all right. I just want to make sure I know what you mean. A weekend pilot is a person not used as an air technician? A. I should not have used the term because it is generally not acceptable as a term. The pilots of the Squadron who are not air technicians, when they arrange their schedule to comply with the requirements laid down by the Commanding Officer so notify operations of their intentions to be available to fly and operations will schedule them for that flight.

Q. Well, then the first action to set up a flight by an individual on a given day in that respect then originates with the individual. Is that correct?

649 MR. WOLCOTT: He didn't say that.

MR. PETTIBONE: If I am wrong he can tell me. Maybe I am wrong. I am trying to find out.

THE WITNESS: On a training assembly day the people report for an eight-hour period and are scheduled for their flying. Now, the obligation remains to fly more than on the training assembly day. Since these people have civilian jobs we cannot direct them when to be there. We make the flying schedule available to them.

MR. PETTIBONE: You mean by civilian jobs, excuse me, you mean outside of your unit?

THE WITNESS: Outside of the unit.

MR. PETTIBONE: Yes. Go on. I'm sorry.

THE WITNESS: We make the flying schedule available to them and they schedule—they are scheduled through operations for their flying.

MR. MUDD: Colloquially they are known as weekend warriors.

THE WITNESS: If you use the phrase. I don't want to.

650 MR. MUDD: I will use it. You don't have to.

THE WITNESS: I don't want to get it in the record here as being used four thousand times in the next couple hours.

MR. PETTIBONE: Well, to me at least it wouldn't denote anything at all derrogatory. It just merely indicates an

individual who only comes out onto the field for the purpose of performing his training. He is not regularly employed and not there all the time otherwise as these air technicians are. Isn't that about it?

THE WITNESS: Yes. The correct terminology, he is a Federally recognized officer of the Air National Guard of the United States, not an air technician.

By MR. PETTIBONE:

Q. Well, then these people in that staus will from time to time perform flights, the purpose of which is to improve or maintain their flying proficiency? A. Yes, sir.

Q. That would be the sole reason for their making the flight? A. It could be or not be, according to the schedule.

Q. Yes. It can be the sole reason flights are made?

651 A. Yes, sir.

Q. Now, the other pilots who are employed as air technicians sometimes make proficiency flights where that is the sole reason also in the same manner? A. Yes, sir. It could depend upon the nature of their most recent duties whether they need their proficiency flight or not.

Q. Now, before any flight is made you have a procedure of obtaining a flight clearance which has to be complied with in the Squadron, do you not? A. Yes, sir, local flight clearance.

Q. Part of that procedure involves the filling out of a form, does it not, and submitting it to a clearance officer? A. Yes, sir.

Q. That will either be to you or someone to whom you have delegated the authority to do it in your behalf? A. It would be to the designated operations duty officer of the day.

Q. All right, and would the request for a clearance to make the flight disclose the purpose for which the

652 flight was to be made? A. Not necessarily on the clearance.

Q. Well, would it be specified in some other manner

then? A. I think the proper place it would be designated would be on the flight operations order.

Q. What is the flight operations order? A. The flight order is the order issued by the unit from the office of the operations officer to cover each flight made by the unit.

Q. Such an order is issued to cover any flight made by anyone in the unit? A. It covers all flights made by aircraft assigned to our organization, whether they are in the unit or attached to the unit for flying.

Q. And do these orders indicate the nature and purpose of each flight? A. If my memory serves me correctly, it is on that order.

Q. Name a few of the common purposes for flights which appear frequently on such orders, or did just prior
653 to May 20, 1958. A. Well, the purposes for flights could be test flights, navigational proficiency flights, administrative flights.

Q. I suppose you have some flights that are for the purpose of just transporting people some place? A. Yes, sir. We get requests from the National Guard Bureau to do such missions and we have other requests to do things like that. They are very few.

Q. Well, the general practice though is to have the flight order which is issued—incidentally, is the flight order issued before or after the flight is made? A. The flight order on a navigational proficiency flight generally is required to accompany the pilot on the flight. That is his authority to be traveling from point to point. In some cases this order has to be shown to the transient services of the other base, but in general on local flights the order is not required to precede the flight. It is a verbal order that is backed up later in writing to account for all the flights made and generally have them accounted for on the order form.

Q. I presume you maintain a file of all these flight
654 orders covering a period of time? A. Yes, sir.

Q. At the Squadron Headquarters? A. Yes, sir.

Q. And is there a standard printed form of some kind that you use where you just have to fill in certain blanks? A. Yes, sir.

Q. Is that the procedure? A. Yes, sir. There is a standard form lacking the order number and the information peculiar to the aircraft and individuals on that flight.

Q. And these orders, I take it, are all issued in your name pursuant to your position and authority as Commanding Officer of the Squadron? A. They are issued for the Commander by order of the Commander and authenticated by the Operations Officer or his designated assistant.

Q. Was that the situation on May 20, 1958? A. Yes, sir.

Q. And some time prior thereto when you were
655 the Commanding Officer of the Squadron? A. Yes, sir.

MR. PETTIBONE: Off the record.

(Discussion off the record.)

(Thereupon, at 4:00 o'clock p. m., the deposition was adjourned.)

* * * * * * * * * * *

662 **Lt. Col. Victor F. Kilkowski,**

was recalled as a witness and having previously been duly sworn, was examined and testified further as follows:

EXAMINATION.

By MR. PETTIBONE:

Q. Colonel Kilkowski, as I recollect you testified at our last session that when a member of the Unit made a flight that flight orders were issued either before or at the time of the flight or just after the flight, as the case may be,
authorizing the flight and describing its purpose or
663 mission. Is that correct? A. That's true.

Q. Now I am going to hand you a document which has been marked United States Exhibit for identification No. 10. Is that the flight order which was issued covering Captain McCoy's flight on May 20, 1958? A. It is, sir.

Q. Does that flight order indicate the purpose or type of flight which Captain McCoy made on that date? A. It is true. It does.

Q. And what does it so indicate? A. It indicates that the purpose of the flight is one of maintaining flying proficiency.

Q. How is that designated on that order? A. It is designated in the actual wording of the order.

Q. All right. Do the words in this order "maintaining flying proficiency" which I have just quoted from the order, refer to Captain McCoy's personal flying proficiency? A. Refer to the flying proficiency of any and all pilots that would be noted on the order.

664 Q. Yes, and he is one of the ones that is noted on this order? A. That's true.

Q. So in this instance it would apply to him, is that correct? A. Yes.

Q. All right. Now, in addition to the flight order which was just identified, it was also the practice and custom, I believe, for a flight clearance to be issued covering a flight when made by a member of your unit, is that correct? A. Yes.

Q. All right. Let me hand you United States Exhibit No. 9 for identification. Can you tell me what it is? A. It is Air Force Form 113, Local Flight Clearance.

Q. Who executed that particular form of which that is a copy? A. Captain McCoy executed the form as pilot of the flight.

Q. Is that the flight clearance which covers his

665 flight in a T-33 on May 20, 1958? A. It is.

Q. Does that flight clearance indicate the purpose or mission of that flight? A. There is a mission block on this flight clearance.

Q. And is that filled in? A. Yes, it is.

Q. And what does it state? A. It states that there is an "O".

Q. Is that a symbol? A. It is a symbol for flight; generally by flight of our F-84's and T-33's from our base.

Q. Well, a flight for what purpose or what mission? A. I would have to get the manual to get the exact definition; but it indicates flight in aircraft general training, operational training.

Q. Now previously you had testified that on May 20, 1958 Captain McCoy was employed as an air technician under the job description or title of Aircraft Maintenance Chief, is that correct? A. Yes, it is.

Q. He was also a Captain in the Maryland Air
666 National Guard assigned to the Unit which you commanded on that date, is that correct? A. Yes.

Q. We also brought up the subject of the pay status of Captain McCoy in each of those capacities and you stated in response to one of my questions at that time that there are two separate and distinct pay statuses; one of which is military and the other of which is air technician and that there were these two possible pay statuses which could apply to Captain McCoy. Is that correct? A. That's true.

Q. You also pointed out in response to one of my questions that if a man is present for military duty at a given time he cannot be in air technician pay status at the same time. Is that correct?

MR. MUDD: Just a minute. Let me enter an objection at this time on the ground that Mr. Pettibone's questions are prefaced on the prior testimony of the witness which was clearly revealed in the deposition which is in front of him and, of course, the witness will reaffirm what he
667 said previously, but I see no need to ask him if he did not previously say this, and this, and this and that, inasmuch as the record speaks for itself on that.

MR. WOLCOTT: I join in that objection.

MR. PETTIBONE: That, of course, is quite true.

MR. WOLCOTT: May I complete my objection? I think the answer that Colonel Kilkowski gave before, the language that he used to express an accuracy of thought, and

I know that Colonel Kilkowski was trying to be very accurate, and I don't think it fair to summarize in your own version of what you think Colonel Kilkowski said, and I am sure you are trying to be accurate too, Mr. Pettibone. I would suggest that in order to take it out of the realm of dispute that you read that part of the testimony that you want to refresh the Colonel's recollection with.

MR. PETTIBONE: Well, I am agreeable to doing that. I was merely trying to do that, since nearly three months have elapsed, to go back sufficiently to be ready to continue on——

MR. WOLCOTT: Yes, I appreciate that, but I would suggest that you read his testimony.

MR. PETTIBONE: All right. I will refer to your
668 previous testimony. For the sake of refreshing your recollection I will refer you specifically to page 642 in the Reporter's transcript of your testimony and ask you at this time if you will read line 6 through, I guess, 14. Just those few lines. There is the page (indicating), and there is the text.

By MR. PETTIBONE:

Q. When a member of your unit was performing duty in a flying training period what was his pay status? A. Flying training period, the man was in a military pay status. After having fulfilled the requirements of the flying training period, at the end of the quarter, fiscal quarter in which he was doing the flying he was entered on regular military payroll along with his other training. His regular training assemblies and his flying training periods are put on the military payroll which is sent in for the issuing of a check for his duty.

Q. Then he would be paid commensurate with his rank, I presume? A. That is true. He is paid in military status which his rank and longevity and other military pay
669 status changes.

Q. Supposing the individual who received such pay in such manner were also employed as an air tech-

nician; that is to say, a civilian employee, as an air technician in one of the job categories allocated to your unit. Could he for the same hours of time involved have been also paid as an air technician? A. No.

Q. Or would those two have to be kept separate? A. You cannot receive the pay for both statuses. It is permissible to be covered under pay under both statuses by virtue of being on an annual leave or compensatory time status in your air technician job, but that is the only way that you may do it. You cannot be on duty in both statuses at the same time.

Q. In other words, then an air technician, if he were performing a flying training period activity would be either on leave from his civilian air technician employment or on compensatory time, or I suppose it could be done on a day when he wasn't supposed to work; in other words,
670 apart from his regular working hours? A. It could be done from outside of his outside working hours, or if his working hours were displaced from the regular working hours of that day it could be obtained during that time. The only provision is that he cannot be present for duty in the air technician status as well as present for duty in the military status.

Q. On May 20, 1958, as an air technician Captain McCoy began work at 8 o'clock that morning, is that correct? A. Yes.

Q. And then later that morning, approximately two and a half hours later, I believe he testified, he began a flight in a T-33, is that correct? A. Yes, sir.

Q. And he made the flight in the T-33 that morning under your authorization as the Commander of the Detachment? A. Yes.

Q. At the time he took-off on the flight that morning, on that day and throughout the duration of that flight in what pay status would Captain McCoy be carried by your unit?

Mr. Wolcott: I object to that on the ground that the

records of the Air National Guard would be the best
671 evidence of that.

MR. PETTIBONE: Well, that is not an objection to the form of the question, necessarily, and in any event I'd like to point out that as the Commander——

MR. WOLCOTT: It calls for a conclusion of law.

MR. PETTIBONE: —as the Commander and as the Base Commander certainly he is in a position to be able to answer the question.

MR. WOLCOTT: Well, you can ask him what the record shows, but I think it is otherwise a conclusion of law.

MR. MUDD: I have no objection to the form of the question. I have no objection to the Colonel answering the question, if it is within his personal knowledge, insofar as what the records indicate. I think Mr. Wolcott's point that it may be a conclusion of law is something that may be well taken but I am perfectly willing to have the witness answer, if he knows.

MR. PETTIBONE: All right. Answer the question.

THE WITNESS: Captain McCoy was carried in an air technician pay status throughout the day. His status
672 changed during the day from present to a sick capacity whereby he started to apply his earned sick leave, which we tried to coincide with the time of the accident as closely as possible.

By MR. PETTIBONE:

Q. Apart from the fact that an accident occurred during the flight which he made that day as a result of which he was injured and went on sick status, was he otherwise carried on the records of your Unit as an air technician for pay purposes during that flight?

MR. MUDD: Same objection. The witness may answer, if he knows.

MR. DAVIDSON: You are referring now to the records. That is the very objection Mr. Wolcott was making earlier. You asked him an opinion. Now you have gone to the records, Mr. Pettibone.

MR. PETTIBONE: Let me just hold that question. I will come back to that. Let me ask you two or three preliminary questions; although I think this is already in the record at our previous session. He has already testified that he, as Base Detachment Commander, was responsible for the keeping of these records.

673 By MR. PETTIBONE:

Q. Going back though to that subject, Colonel Kilkowski, as Base Detachment Commander did you keep or have kept under your supervision the pay and attendance records for civilian air technician employees of your unit? A. Yes.

Q. Did you keep or have kept such records pertaining to the hours of work performed by Captain McCoy? A. Yes.

Q. Did you keep such records relating to the attendance and hours of work of Captain McCoy on and prior to May 20, 1958? A. Yes.

Q. Were those records used for determining Captain McCoy's pay or compensation for the work which he performed? A. Yes.

Q. Was receipt of his pay for such employment by Captain McCoy contingent upon the preparation and keeping of the records which I have just referred to? A. The question is somewhat vague. Captain McCoy was in an air technician status with the Unit. We did keep
674 records on him. He was daily marked either present, sick, on annual leave, or annual leave without pay, and based on this pay record which is submitted on a payroll to Bolling Field he received a check in compensation for this, and this was done on Captain McCoy. He was in an Air Technician status that entire day.

Q. All right. Now, when he commenced the flight which he made on the morning of May 20, 1958 how was he carried on the records which you kept or were kept under your supervision for pay purposes? A. Carried "present".

Q. Present in what capacity?

MR. WOLCOTT: I submit he has already answered that.
MR. MUDD: Go ahead, Colonel, if you know.
THE WITNESS: Present for duty.

By MR. PETTIBONE:

Q. Do you mean present for duty as an Air Technician civilian employee?

MR. MUDD: Could you ask him—maybe we can get to the heart of it—if the records indicate in what capacity he was carried as present or whether they indicate one
675 or the other?

THE WITNESS: I think your terminology is getting me somewhat confused. Captain McCoy was hired as an Air Technician at the Maryland Air National Guard Base in the capacity of the Aircraft Maintenance Chief and as of 8 o'clock on 20 May 1958 he was marked present for duty in that capacity.

By MR. PETTIBONE:

Q. Well, now, was he later in the day marked not present for duty in that capacity? I believe you mentioned he went on sick leave, which is a different capacity, is it not? A. That's true. If one of our employees is sick or injured and not capable of reporting for duty he goes on sick leave status. Each employee earns as a condition of his employment so many hours of sick leave per month, which he can accumulate and is carried on the records of the Unit and if he gets sick or is injured he is still carried in a pay capacity but he starts to use the sick leave in order to qualify for the pay.

Q. Do you know what time he went on sick leave on that date? A. I could not give you the exact time from
676 memory. I think it is indicated on the various records that have been produced here.

Q. Well, in any event it could not have been sooner than the time he was actually injured as a result of the airplane accident in which he was involved that morning, is that correct? A. It could not. I think the stipulation

on sick leave is that it is carried on the nearest hour and I would have to refresh my memory as to exactly when the sick leave condition started, and that could be produced from, as I say, from the records that have been introduced prior to this time.

Q. Well, if I understand you correctly, as an administrative procedure sick leave is computed to the nearest hour and not divided into minutes. Is that the point? Is that correct? A. As I say, I would have to refresh my memory, but as best it serves me right now it is credited to the nearest hour and also utilized to the nearest hour.

677 Q. What caused him to go on sick leave on May 20, 1958? A. The fact that we were notified that he was injured and would not be available for duty.

Q. That he was injured in this airplane accident that we are dealing with here? A. Yes, sir.

Q. Prior to the time when he was so injured he was present for duty in his Air Technician employees status? A. Yes.

Q. After he took off in the T-33 that morning and prior to the time when he was injured in the following accident, was he in such status: that is to say, that of present for duty in his Air Technician employee status? A. As I stated he was present, marked present for duty in his Air Technician status up to the time of the accident and then he was marked sick, sick status; actually, the sick covering both injury and sickness.

Q. Would the time he spent making this particular flight on that morning have qualified him for the performance of a flying training period for the computation of time as part thereof for military pay purposes? A. No, it would not.

678 Q. Do you know whether subsequent to the making of that flight, or at any time he applied for the application of the time which he spent in making that flight to a flight training period for military pay purposes?

Mr. Mudd: Of the Colonel's own personal knowledge?

Mr. Pettibone: That's right.

The Witness: No, he did not.

Q. (By Mr. Pettibone) Well, by your own personal knowledge, I mean as Commander of the Unit you authorized flights to be made and you also verify the records pertaining to such flights for pay purposes, or it is done by your direction. Isn't that correct? A. That's true.

Q. I am referring to your capacity in that respect when I ask this question. A. You are referring to the time of 20 May. It was at that time.

Q. Yes, that's right. A. Mr. Pettibone, Captain McCoy was in an Air Technician status and was paid as an Air Technician that day. His pay was received from
679 appropriated money, Federal money for the purpose of his pay. His pay was applied for to Finance Office of Bolling Air Force Base and a check was issued. His pay did not cease at the time of the accident because he had accumulated sick leave in order to continue his compensation. If you are concerned about his aircraft flight, I mentioned in earlier testimony that he can fly in several statuses. The pay status that he is in does not have any bearing on his flying status. He receives his right to fly the aircraft by virtue of his rating as a pilot and by virtue of the order to participate in frequent aerial flight. There are no provisions in Air Technician directives that allow us to qualify a man for flight. There are provisions that the man may continue to fly in that status. Now, regardless of what status he is in, whether he is in the military status or in Air Technician status, he is flying by virtue of his rating and order to participate in frequent aerial flight when he steps into the aricraft. That is the best as I can say it. I know it is a rather nebulous thing, and this is the best I can do in my explanation of it.

Q. Well, Captain McCoy was employed to perform certain specified duties in connection with his work as
680 an Air Technician on May 20, 1958, was he not? A. Yes. He had certain designated duties which are by no means the limit of his duties.

Q. And those duties are described in a job description outline or job description form which is part of a civilian personnel manual describing various Air Technician jobs, is it not? A. Yes.

Q. Now I am going to hand you United States Exhibit No. 4 for identification. Is that the description of the position Aircraft Maintenance Chief which Captain McCoy held on May 20 1958?

Mr. Mudd: Does this page contain the complete description of Aircraft Maintenance Chief?

Mr. Pettibone: Yes. Off the record.

(Discussion off the record.)

Mr. Pettibone: For the record let me state that United United States Exhibit No. 4 for identification is a copy of page 107 of Air National Guard Manual, ANGM, 40-01, entitled Civilian Personnel Manual, dated 1 March 1958, and page 107 thereof is entitled Aircraft Maintenance Chief, Job No. 43-10.

681 Mr. Wolcott: Could that manual be marked for identification, the manual itself, so we have a reference to it, on the cover of the manual?

Mr. Pettibone: I think we have done that already.

Mr. Wolcott: This particular manual?

Mr. Pettibone: I think so. According to the notes which I kept of our last meeting that was already marked at your request in the same manner as you asked United States Exhibit No. 11 for identification. So it is already marked.

Mr. Wolcott: It is already marked.

Mr. Pettibone: Come to think of it, it is already marked. The record may therefore indicate that the manual which I have just described is already marked United States Exhibit No. 11 for identification in connection with the taking of this deposition.

The Witness: May I just refresh my recollection.

Mr. Mudd: I presume Mr. Pettibone has no objection.

Mr. Pettibone: None at all. Can you answer the question now, Colonel Kilkowski?

The Witness: Will you read back the question?

682 (Question read by Reporter.)

Q. (By Mr. Pettibone) Did Captain McCoy during the period of time when he was employed under that job desciption as an Aircraft Maintenance Chief in your Unit perform the duties generally described therein? A. Captain McCoy performed those duties and other duties too.

Q. Do any of the duties described or listed therein require or permit him to make aerial flights?

Mr. Mudd: I will object, inasmuch as the document speaks for itself.

Mr. Wolcott: I join the objection.

The Witness: Should I answer?

Mr. Mudd: Go ahead.

The Witness: Captain McCoy performed the duties of Aircraft Maintenance Chief. At the time he was performing these duties we did not have a Maintenance Supervisor assigned at the Base. Captain Jesse D. Mitchell was undergoing training in a military status at Chanute Air Force Base and was slated to return to the Unit as the Aircraft Maintenance Supervisor and was hired so as
683 that time. So Captain McCoy, in addition to his duties as Aircraft Maintenance Chief, also had to assume, in Major Mitchell's absence, those duties of the maintenance supervisor. Under my job description as Base Detachment Commander it states that I am responsible to see that operations, administrative and related activities are operating in an efficient manner to accomplish the work load that is required and essential in preparing for the training of the Air National Guard personnel Units. Since we did not have a Maintenance Supervisor at the Base, Captain McCoy being the next senior Maintennace man on the Air Technician status had to assume his duties.

A check will show that the duties of the Maintenance Supervisor also included flying as a stated requirement,

or suggested requirement, and it was just good business to have the head of the Maintenance Section in a flying capacity and qualified as a test pilot and general pilot in all capacities. That way he had better control of the maintenance, quality control or the aircraft and we saw fit to assign him these additional duties.

Q. Now, the regular Maintenance Supervisor—is
684 that his correct title? Maintenance Supervisor? A. Maintenance Supervisor.

Q. Is that also an Air Technician civilian employee position? A. Yes, it is.

Q. For which a job description is provided? A. Yes.

Q. In the manual which you are referring to? A. That's true.

Q. And was that job regularly held on May 20, 1958 by Captain Jesse D. Mitchell? A. Correction. Major Mitchell. Major Jesse D. Mitchell, as I explained, was undergoing the course of training and was to return to the Unit in a pay status as a Maintenance Supervisor. He is presently in that status with the Unit now and has been in it since his return from the Chanute Air Force Base.

Q. Was he assigned to that position on May 20, 1958? A. I'd have to refresh my memory on it but, as I remember it, he was assigned in a leave-without-pay status while
685 he was under—in a military pay status at Chanute Air Force Base.

Q. How long had he been absent in this leave-without-pay status that you have just mentioned prior to May 20, 1958? A. I can't answer that question without the records.

Q. Can you recollect the approximate length of time? Was it a short time or a long time? A. As I say—

Mr. Davidson: Would that be material here, Mr. Pettibone, whether it was a day, or a week, or a month?

Mr. Pettibone: Well, I really don't know because I hadn't heard of this whole situation before, so I am trying to find out about it myself and I am not sure yet.

The Witness: I think it is all in the record. It was covered before.

Mr. Pettibone: Well, it slipped my recollection at the moment, but that's all right.

Q. (By Mr. Pettibone) Did you as the Base Detachment Commander notify Captain McCoy on or before May 20, 1958 that he was to fulfill the duties and responsibilities of the Maintenance Supervisor in the absence of Major Mitchell? A. Yes.

686 Q. Did you do that in writing or verbally, or both? A. Again I would have to check the record to refresh my memory.

Q. Is it possible that written orders were issued or published designating Captain McCoy to fill this position in addition to his regular one? A. Could be possible, but it is not absolutely necessary.

Q. Could you check the records of your unit for that period of time to ascertain whether or not any such orders were ever issued? A. I could check the records. I couldn't say for sure that they still exist, since this occurrence you are talking about is over two years ago.

Mr. Pettibone: Well, please do so and later I will have to recall you because I'd like to have an answer to this. I wish you would check the records of the Unit to ascertain anything that you can find which might show that Captain McCoy was the subject of either a written order or a written instruction, or any writings of any kind which would indicate that he was to perform the duties of

687 Maintenance Supervisor on May 20, 1958, during the absence of Major Mitchell on a leave-without-pay status. Will you let me know in due course, Mr. Mudd, about that?

Mr. Galiher: May I suggest, since your answer requests written documents, if there are any, that he answer it simply by producing them so we all may have copies, if there are any, or if he is unable to find any that he simply tell Mr. Mudd and Mr. Mudd can advise us.

Mr. Mudd: Let me say this, if there are such records and they can be located we will be glad to produce them, subject to any military order which might control the situation and which I am not familiar with right now; but certainly if it is available and there is no military reason or regulation why it should not be produced, be glad to do so.

Mr. Wolcott: Off the record.

(Discussion off the record.)

Mr. Pettibone: On the record again.

Q. (By Mr. Pettibone) Do you recollect at this time whether or not Major Mitchell was absent from the Unit for a fairly long period of time around May 20, 1958? A.
688 If my memory serves me correctly, the course that he was undergoing was nine months.

Q. Did Captain McCoy perform the duties and responsibilities of maintenance supervisor in the Unit during that entire nine-month period, or most of it, at least? A. There was a period in there prior to May 20th Captain McCoy was actually named as the Maintenance Supervisor. Early in 1958 we received additional positions, Air Technicians. Major Mitchell was assigned as Aircraft Maintenance Supervisor. Captain McCoy was assigned as Aircraft Maintenance Chief. Exactly when this occurred, I do not know.

Q. Well, let me show you United States Exhibit No. 3 for identification, this being a copy of Special Order No. 93 of the State of Maryland, Fifth Regiment, Baltimore. Does this Exhibit No. 3 for identification enable you to refresh your recollection concerning Captain McCoy's change of status from Maintenance Supervisor to Aircraft Maintenance Chief and the date thereof? A. Yes, it does. The change was made on the 16th of May 1958.

Q. Then in other words, up to May 16, 1958, or perhaps I should say on and prior to May 16, 1958 Captain
689 McCoy was employed as an Air Technician under the job description title of Base Maintenance Supervisor? A. That's true.

Q. And on and after that date by that order then he was transferred to the job title and description of Aircraft Maintenance Chief, is that correct? A. That's true.

Q. Do I understand that notwithstanding such change in assignment nevertheless in fact on May 20, 1958 he was performing the duties of a Base Maintenance Supervisor—

Mr. Davidson: As well as—

Q. (By Mr. Pettibone) —as well as Aircraft Maintenance Chief? A. Yes. He had to perform those duties because being the senior maintenance man on the Base he had to assume the duties of the superior that was not present for duty at the time.

Q. Did his performance of duties as Base Maintenance Supervisor require him to make the flight which he made on May 20, 1958 in a T-33?

Mr. Davidson: Object to asking him whether it
690 required him to make it at that time, Mr. Pettibone. It might permit him to, or might be appropriate.

Mr. Pettibone: Well, I will be glad to include that in my question.

Q. (By Mr. Pettibone) Did they require him to make the flight, or did they permit him to make the flight; either one, or both?

Mr. Mudd: You are asking now only about the classification of Base Maintenance Supervisor?

Mr. Pettibone: Well, perhaps before you answer this question let me ask one or two more to make it clearer.

Q. (By Mr. Pettibone) I am trying to get at, or course, the duties which Captain McCoy was performing as an Air Technician on May 20, 1958. I assume that from what you have already testified that in addition to those duties listed for his assignment as Aircraft Maintenance Chief he also performed additional duties which are properly described or referred to as those of a Base Maintentance Supervisor. Is that assumption of mine correct? A. Yes.

Q. So that now returning to my question, what I
691 am trying to get at, of course, is this: Did the duties which he was performing as Base Maintenance Su-

pervisor, these being the duties in addition to those which went with his job, his regular job as Aircraft Maintenance Chief, permit or require him to make the aerial flight which he made on that date in a T-33? A. Again the question is difficult. If a man has a flying status and is hired in the position where his flying status will enhance his chances to do a good job as an Air Technician then he receives general requirement to maintain his proficiency in his capacity. In Captain McCoy's case he had such flying status, was fulfilling a job whereby his flying status would enhance his job ability and, therefore, received a general requirement to fly.

Mr. Mudd: Are you finished?

The Witness: Yes.

Mr. Mudd: All right.

Q. (By Mr. Pettibone) Well, now, is there any requirement though as respects his normal, assigned job on that date of Aircraft Maintenance Chief that he have proficiency or be qualified to fly as a pilot?

692 Mr. Buckmaster: I think he has already answered that.

Mr. Wolcott: He answered it two or three times.

Mr. Pettibone: It seems to have slipped my mind. Could he answer it once more?

The Witness: There is no mandatory requirement. To further explain at this time, it is just good business practice when a senior man of an operation is missing that the next senior man in line takes over the duties of that position. He was required, since he did have a flight status granted by the Air Force, to maintain this flight status and perform flight checks, flight quality control of the aircraft and various other things. It is not a requirement in an Aircraft Maintenance Chief's position that he be on flight status. At the present time Major Jesse D. Mitchell having returned from school and assuming the duties of the Maintenance Supervisor is presently performing those duties.

Captain McCoy is still hired and retained as an Officer-Air Technician, and is not on flying status and not required to fly. I think you have to put yourself in a position of the time that occurred at that time—excuse me,
693 the status that we were in at that time as to whether he would have the flight requirement or not. I think I would be amiss as a Base Detachment Commander of having a man qualified to check the quality control of his aircraft performance, flight tests, and in general better know the maintenance of his aircraft and not require him to fulfill his duty.

Q. Well, insofar as you know, this flight made by Captain McCoy on that date was not made for any specific maintenance purpose or function, was it? A. No, it was not.

Q. It was made, I take it, from what you say then, as a matter of good business practice, did you say, in the general conduct of the Unit as Commander of it?

Mr. Mudd: Just a minute. Now, again what the Colonel has said is clearly in the record and I think it is a little bit repetitious to ask him if he has said this and if he has said that.

Mr. Pettibone: Well, I don't want to do that.

(Testimony read by Reporter.)

Mr. Pettibone: Off the record.

694 (Discussion off the record.)

Mr. Pettibone: On the record I withdraw my question.

Q. (By Mr. Pettibone) On May 20, 1958, was Captain McCoy the next senior man under Major Jesse Mitchell? A. Yes, in the Maintenance field.

Q. Is there a job description of your own authorities and responsibilities as Base Detachment Commander which was in effect on May 20, 1958? A. Yes, sir.

Q. Does any part of that authorize you to permit the making of the flight which Captain McCoy made on May 20, 1958 for the reasons which you have stated here?

Mr. Mudd: I object inasmuch as that document would also speak for itself. If you want the Colonel's interpretation of the document or his duties, I have no objection to that.

Mr. Pettibone: Well, I didn't ask him to recite any specific part of it. I just asked him if it authorized him to do this. He should know that. He held the position. He was Base Detachment Commander.

695 Mr. Mudd: Well, I object. Again, if you are asking him what his job description authorizes him to do then the best evidence is the description itself.

Mr. Davidson: He really ought to have on opportunity to see it, Mr. Pettibone. There is such a document, I understand.

Q. (By Mr. Pettibone) Is the description of your job as Base Detachment Commander on May 20, 1958 contained in the United States Exhibit No. II for identification, which is there before you on the table? A. Yes, it is.

Mr. Wolcott: Could you give us chapter and verse on that?

Mr. Pettibone: Yes. Give us the job title and the page number from that exhibit.

The Witness: Page number 23. Base Detachment Commander. At that time the job number was 00—it is either 02, or 01. There was a change about that time. I can't remember the exact date of the change. Both these job numbers that I show are listed down here and merely means the difference in the grade.

696 Q. (By Mr. Pettibone) Will you please indicate which item in this job description which you have just identified authorizes you as Base Detachment Commander to approve and allow the flight which Captain McCoy made on May 20, 1958.

Mr. Mudd: Again I object inasmuch as the document speaks for itself, but will permit the witness to answer.

The Witness: There is no authorization in this document to authorize me to allow any individual to fly upless

he have prior approval of the Air Force. Before I can direct any one to fly under this document the pilot in question has to have a rating and an active flying status order with the United States Air Force. If he has that and his duties require flight then by virtue of this document I can require his participation in flight. Prime example of that would be a flying training supervisor where a flight status is mandatory as a condition of his employment. In other cases flight status is desirable but yet not mandatory, but in any case this document does not allow me to take any Air Technician by virtue of his being an Air Technician—the man in question has to have prior rating and flight status.

697 Q. Well, now, are you finished? A. Yes.

Q. On May 20, 1958, to your knowledge Captain McCoy had been authorized by the Air Force to fly and did have a rating—is that what you call it? Rating for flight status? A. There are two conditions. There is a rating as either a pilot, senior pilot or command pilot. In Captain McCoy's case he was a pilot and also a current flight status which is an order directing this individual pilot to participate in frequent aerial flight.

Q. Well, then to your knowledge had Captain McCoy satisfied both those conditions? A. Yes, he had.

Q. On that date? A. Yes.

Mr. Davidson: Did I understand that both of these are from the United States Air Force?

The Witness: To the best of my recollection they both come from Secretary, Air Force Office, or Department of the Air Force.

Mr. Pettibone: Will the Reporter go back and read

698 that last long answer?

(Testimony read by the Reporter.)

Q. (By Mr. Pettibone) Did Captain McCoy's duties as an Air Technician require him to make the flight which he made on May 20, 1958?

Mr. Davidson: It seems to me that has been answered.

Mr. Mudd: Objection again as to the word "require".

Mr. Pettibone: Look. I just made notes right out of the answer which he gave to the question. He said: Only if the duties of an Air Technician require can I authorize such a flight. I mean that has just been read out of the record so I could get it straight, so my question is based exactly on what he said. I can't accept the objection for that reason. Sorry.

Mr. Mudd: It is all right. You don't have to accept it. I just want to make it.

Mr. Pettibone: Well, I would be glad if we could agree.

The Witness: It was desirable that Captain McCoy fly, since he was in addition to this other duties carrying out those of the Maintenance Supervisor and under the
699 qualification it states that it is desirable that he be a rated flyer on flying status and he was carrying out those duties which do not necessarily always involve maintenance activity but involve just general proficiency and other flight activity.

Q. (By Mr. Pettibone) When you use the term "desirable" in your answer to this question are you referring to your own personal or official preference, or is the term as you have used it based on a specific provision in the job description? A. It is in the job description and contained in the manual.

Mr. Mudd: Identify and quote it, if you will.

Q. (By Mr. Pettibone) All right. Will you please indicate the exact reference to which job description on which page in which manual that is to be found? A. Page 105, the job description of Maintenance Supervisor, Job No. 43-00. It is under Section 6-B-2.

Mr. Mudd: If Mr. Pettibone has no objection, could he, since we don't apparently have any extra copies, read that part into the record, Mr. Pettibone.

Mr. Pettibone: Yes, it is all right with me.

700 Mr. Mudd: Read from B.

Mr. Pettibone: The only thing we don't have for

the record is the statement of which manual this is. It is the manual which has been marked as United States Exhibit for identification No. 11 and he is reading at page 105 thereof. Go ahead, Colonel Kilkowski.

The Witness: Correction. I am reading from page 106, Section 6-B-2.

Mr. Mudd: It began on 105. He has turned the page and the quoted portion is on 106.

The Witness: There are two desirable qualifications listed for this position, completion of an Air Force Maintenance Management Course and be a rated pilot on flying status to enable encumbent to make test flights on assigned aircraft.

Captain McCoy had both these qualifications.

Q. (By Mr. Pettibone) Are either or both of those qualifications required of an Aircraft Maintenance Chief?

Mr. Wolcott: This is "required" rather than "desirable"?

Mr. Pettibone: Right.

701 Mr. Mudd: Yes.

The Witness: There is no stated requirement as such in Aircraft Maintenance Chief job description.

Q. (By Mr. Pettibone) Did Captain McCoy personally request permission from you to make this flight on May 20, 1958 before he made it? A. Yes.

Q. Did you discuss the flight with him at that time? A. If my memory serves me correctly he discussed the flight with me the preceding Saturday prior to the accident, or I should say prior to that May 20 and indicated that he had an individual that was interested in flying training program, would I clear such a flight in the future. I indicated that I would.

On the morning of May 20 he indicated that he was going to take a proficiency flight and had the individual in mind that he discussed with me prepared to fly with him, would this be approved. I said "Yes."

Q. Did he mention any other reasons for wanting to make this particular flight on that day? A. Reason for the flight was his general proficiency.

702 Q. Well, you mentioned that already. Did he mention any other reason? A. I think prior testimony would show that Captain McCoy himself indicated just general other reasons and I indicate those too. In my capacity as Base Detachment Commander I fly for proficiency but at the same time I check the efficiency of the Air Crew personnel, the efficiency of the Tower personnel and all associated flying activities. Captain McCoy would be checking on these two at the same time; the way the aircraft handles, the way the aircraft performs and in general will know the knowledge of, better knowledge of his maintenance without making a specific flight check; the way the aircraft forms are kept, the way the maintenance people on the line react. These are all sidelights on the flight of general proficiency.

Q. My question though was this: Did Captain McCoy mention any of those or any other reasons for making the flight which he made on May 20th? A. The only indication was for general proficiency.

Q. On May 20, 1958 did your Unit have any special missions of any kind assigned to it which required

703 it to make other than the normal number of flights made for the normal purposes as a mater of routine operation of your Unit?

Mr. Mudd: Object on the ground of materiality. The witness may answer, if he can.

The Witness: To be perfectly honest I'm afraid I don't understand the question.

Mr. Mudd: All right.

Q. (By Mr. Pettibone) Well, in the answer to one of my previous questions; not today, but the last time we were here, you gave an answer and as part of it you mentioned that at a certain time your Unit was assigned a special mission which involved extra flying of some kind

for some purpose. I can't say that I remember the exact details now but my question is to inquire whether or not there was any such mission on May 20, 1958?

Mr. Mudd: Same objection.

The Witness: I think I know what you are referring to and I will answer the best as I can. As I recollect it, when I mentioned special mission I was referring to radar tracking missions that we were running with and for the Aberdeen Proving Ground.

704 Q. (By Mr. Pettibone) Would you like me to—excuse me for interrupting, but if you'd like I can read you from page 643 of the transcript exactly what you said in that connection.

Mr. Mudd: Why don't you read it off the record?

(Discussion off the record.)

Mr. Pettibone: That is the type of thing I am referring to.

The Witness: In other words, you mean was that a special mission?

Mr. Pettibone: Yes. That is the term which you used. All right. Go on.

The Witness: Well, that answers it.

Mr. Mudd: I believe his question is whether on May 20th there was any special mission that the 104th engaged in.

The Witness: No. I think I can safely say that there weren't on that day.

Q. (By Mr. Pettibone) There were not on that day? A (Shakes head negatively.)

Q. Is that right? A. That's right.

705 Q. I believe you mentioned in your testimony that Captain McCoy was authorized to make test flights to check out equipment; that is to say, aircraft, is that correct? A. Yes.

Q. Let me show you United States Exhibit No. 5 for Identification, which is a copy of Standard Operating Procedure No. 3. Do you recognize that? Can you state what it is?

My question was can you identify that? A. It appears to be a true copy of an SOP that was published on 2 January 1957. I can't vouch for the wording of it. It is not complete as it sits here; since the Standard Operating Procedure bears no signature line on it and I can't remember, my recollection doesn't tell me whether there was another page of this or if this information is correct here.

Q. Where is the original of that document at the present time, if you know? A. I do not know. The original of all these documents were turned over to the Air Force Investigating Board from Bolling Field.

706 Mr. Pettibone: Off the record.

(Discussion off the record.)

Q. (By Mr. Pettibone) Let me ask you this on the record. Could a true copy of Standard Operating Procedure No. 3 dated January 2, 1957 be found in the files or records insofar as you know of your unit at this time? A. To the best of my knowledge, no.

Mr. Davidson: Off the record.

(Discussion off the record.)

Q. (By Mr. Pettibone) As Base Detachment Commander on and before May 20, 1958, how frequently did you authorize Air Technicians employed by the Unit to make flights for the purpose of maintaining or improving their general flying proficiency as you did on May 20, 1958 with respect to the flight made by Captain McCoy?

Mr. Mudd: Object.

The Witness: I don't recollect that information now.

Q. (By Mr. Pettibone) Well, did you authorize those kind of flights frequently or infrequently?

Mr. Wolcott: I think the record shows how many

707 flights per week.

Mr. Pettibone: No, that is not what I am asking him.

Mr. Mudd: You are also presupposing that there were other Air Technicans on flying status.

Mr. Pettibone: Yes. Well, perhaps I should ask that.

Q. (By Mr. Pettibone) Were there other Air Technicians besides Captain McCoy who met the requirements for flying status of the Air Force, as you have outlined them? A. Yes.

Q. About how many others were there, or exactly how many others were there on May 20, 1958? A. I would have to search the records at the time, Mr. Pettibone. I think it is already in the record. After we reflected on that answer quite a long while before I think we came out with a number. I have to make a guess, John, that's all.

Mr. Mudd: Just state approximately.

Mr. Pettibone: That will be all right. Just state approximately the best you can.

708 Mr. Mudd: Six, a dozen, two dozen, eight? Just a rough approximation.

The Witness: Roughly six.

Q. (By Mr. Pettibone) All right. Now returning to my question, did you frequently or infrequently authorize any of them to make such flights for that reason?

Mr. Mudd: Excuse me. Would you state again what you mean by "for that reason"?

Mr. Pettibone: Well, go back and read my very first question.

(Question read by Reporter.)

Q. (By Mr. Pettibone) That is my question. Did you authorize flights of that type frequently or infrequently?

Mr. Mudd: Objection. Now you answer if you can.

Mr. Davidson: Isn't that kind of a vague term, as to what is meant by frequently or infrequently, and I assume these things would be of record to show when the flights were made.

Mr. Pettibone: Well, I am hopeful at getting it more specific myself. If he gives me an answer to that ques-

tion perhaps I will be able to follow it with further
709 questions too. I would like to know exactly, if I could, how often and when such flights were authorized by Colonel Kilkowski.

The Witness: Well, frequently is a matter of degree. It all depends on what you consider repetitious enough to be called frequently. The Air Force uses the word "frequently" in their direction to participate in frequent flights and it could be as little as fifty flights a year, accumulting a hundred hours; but I tell you the truth, I couldn't possibly recollect two years ago what people did in an Air Technician status as to whether it was frequent or not frequently, based on your knowledge of what that means.

Q. (By Mr. Pettibone) Well, let me ask you this. Did you authorize one flight of such nature one a week, generally? A. Mr. Pettibone, I can't recollect. You have to realize that these people could be in an Air Technician status and at other times they are in a military status.

Q. How recently were you the Base Detachment Commander out there at this Unit? Are you still the
710 Base Detachment Commander? A. Yes.

Q. You are still the Base Detachment Commander? Well, at the present time, say during the past six months how many flights have you authorized Air Technicians to make to improve their general flying proficiency?

Mr. Mudd: Objection. The question i completely immaterial. Go ahead and answer it.

Mr. Wolcott: It is outside the scope—

Mr. Davidson: I object on the grounds expressed here.

The Witness: This is an extremely variable thing, Mr. Pettibone. I might go on to explain a litle bit. If we receive from the United States Air Force an order requiring that we participate in some sort of maintenance activity that requires all the aircraft to be flight checked, that particular coming week the Maintenance Supervisor might have to fly fifteen times to flight test fifteen aircraft,

helped out by the Flying Training Supervisor. If we have good weather and we have weapons delivery range available and we have people that are available to come
711 down and fly, again it might be quite a bit. Now, the following week we might have bad weather, no range times, no flight test to make, and it could possibly be that nobody flew for the entire week. So this is an extremely variable thing depending upon the work load at the time. That is the best answer I can give to you on it. I am not trying to be evasive.

Q. (By Mr. Pettibone) I appreciate that very much. Actually I didn't mean to refer to flight for the purpose of testing equipment or aircraft, or any other such purpose related thereto. I was referring only to flights, the purpose and intent of which is to improve or maintain the flying proficiency of the individual who is piloting the plane.

Mr. Wolcott: It has already been testified to last week, Mr. Pettibone.

Mr. Pettibone: Last week?

Mr. Wolcott: I mean—I'm sorry, last time it was testified to. I asked him the question.

Mr. Pettibone: Did you get an answer?

Mr. Wolcott: Yes. It is right in the record.

Mr. Pettibone: I have no recollection of any such
712 question or answer, but my memory may be faulty, although I have read this over very carefully. I don't mean to embarrass you. You can point it out to me. I would genuinely appreciate it. Off the record.

(Discussion off the record.)

Mr. Pettibone: Back on the record.

Q. (By Mr. Pettibone) Do you have any recollection now that you ever authorized any Air Technician employed by your Unit on or before May 20, 1958 to make a flight during duty hours or while on duty status as an air technician for the purpose of improving or maintaining his

flying proficiency? A. Yes, I have, in conjunction with the duties. Yes.

Q. Can you mention any specific ones, naming the individuals or the date or time of the flight? A. I can't mention the date or time of the flight. I can merely say that assuming that a man has a responsibility to flight test aircraft which might occur rather infrequently, you don't put him in that aircraft to flight test it without maintaining his proficiency. He is supposed to be one of the most qualified people you have and he will have
713 a flight test one day and maybe the following couple days he might have a proficiency flight to maintain this proficiency in order to flight test.

Q. Excuse me. Now I don't mean to interrupt you, but I don't want to be concerned in this question with any flights which were made to test the equipment, for flight test as you are using that term.

Mr. Mudd: Well, he just mentioned, go up two or three days later on a proficiency flight. The latter part of his answer mentioned proficiency flight.

Mr. Davidson: He answered your question the first thing, that he couldn't mention specific dates or anything, but then went on to explain why these men have to have proficiency flights.

Q. (By Mr. Pettibone) Was the authorization of such flights by you on or before May 20, 1958 a common occurrence? A. Yes, it was a common occurrence and still is. I will give you an example why it has to be. On one day a flying training supervisor might lead a flight to the gunnery range and in addition to trying to qualify the other people in the flight, which might be people in
714 the military status, he is also seeking his own qualification. Then after he reaches his own qualification he will fly for proficiency and also lead flights down there to bring up the other people's qualifications as a matter of his duties. So, in one case, eevn in both cases, even though he is doing the same thing one might be called

his own operational training and the other his training for proficiency. It is a matter of terminology.

Q. All right. A. Each of them are within the scope of his duties.

Q. That is true, but now eliminating all those flights where maintaining proficiency is incidental to other things in the manner in which you have mentioned, such as flying down to a gunnery range or bringing people back, and all the other purposes for which a flight might be made; let's confine it now just to those cases where none of those conditions exist and the flight is made solely for the purpose of maintaining the individual's flying proficiency and for no other reason. Do you recollect that you authorized any other flights for that sole reason by these air technicians on or before May 20, 1958?

715 Mr. Wolcott: I object.

Mr. Mudd: Objection.

Mr. Wolcott: I object to that question. In the first place that question makes an assumption of fact which is not in the record, and an assumption of fact that you make that flight on May 20th had no reason.

Mr. Pettibone: All right. You stated your objection.

Mr. Wolcott: I think you are making an assumption there and I'd like to point that out to the witness. It is inconsistent with the witness' prior testimony.

The Witness: I stated—

Mr. Mudd: Wait until everybody gets through.

The Witness: I stated before in elaboration on another question and I will state again that there is no flight that has as its beginning and end solely proficiency; any flight taken by an air technician, because by virtue of their duties they are bound to observe other things that fall under their jurisdiction.

In my case as Base Detachment Commander, responsible for the overall flying supervision of the Base, I

716 cannot take a flight unless I witness the other activity that is in support of that flight and be able to render

a decision of whether it is proper. The Operations Officer is the same. Flying Training Supervisors, Maintenance Officer is the same. He goes up on a flight. He couldn't possibly fly without recognizing the quality control of the maintenance that his people are turning out.

So even though the stated reason is proficiency, the actual end is to improve these people in the ability to do their job and Unit proficiency. The directive under which the entire Unit trains once it has received the qualification level which our Unit is presently in is a terminology proficiency.

You try to draw a fine line when you refer to proficiency. Every time you drive your car you are gaining proficiency, but that is not why you drive it. Now, if I am vague, I'm sorry, but I'm trying to be as helpful as I can on these technical points.

Mr. Pettibone: Those are all my questions. No more.

(Thereupon, there was a recess from 12:30 to 1:30 o'clock p.m.)

717 Examination by Mr. Wolcott

Q. You mentioned the Aberdeen Proving Grounds, Colonel. What are they? Is that a United States Government Reservation? A. It is, to the best of my knowledge, operated by the United States Army.

Q. It is the area a reservation of the United States? A. It is a Reserved Air Space, designated as such. The United States Army conducts its operations within that area.

Q. You also stated that there was a radar tracking project which was sponsored by the United States Government. Now can you tell us something about that insofar as it affected your operation? A. I think that the conditions of the project would be such that all I could say is that we do fly aircraft in conjunction with the project there. Our knowledge of the project is extremely limited and we use

the aircraft for tracking only. We have designated points to fly over and I couldn't elaborate on the project at all.

Q. Well, is that project sponsored or operated by the United States Government?

718 Mr. Pettibone: Excuse me, Mr. Wolcott, I have to object.

The Witness: I do not know.

Mr. Pettibone: There is nothing to show that that has any connection with the time or place of this accident.

Mr. Wolcott: Will you answer it?

The Witness: I do not know what agency is actually doing the work.

Q. (By Mr. Wolcott) Well, it is an agency of the United States Government? A. I assume so.

Q. As I understand it, your aircraft are directed to participate in this project of this agency? A. We have the authorization and the assigned flying time from National Guard Bureau to participate in the project.

Q. That is the National Guard Bureau in the Pentagon? A. Yes.

Q. Is this tracking a weather operation or what kind of an operation is it generally? Can you characterize it generally? A. Mr. Wolcott, from the type of mis-

719 sion that it is I'd perfer not to elaborate. I have given you as much as I know about it.

Mr. Pettibone: I'd like the record to show that I object to all the questions in that series on the ground that there is no showing of relevancy in any way in connection with the time and place of the accident involved in this litigation.

Q. (By Mr. Wolcott) Do you know a Colonel Irving Ebaugh? A. Yes, sir.

Q. What is his status? A. Colonel Ebaugh is the United States Property and Fiscal Officer for the State of Maryland.

Q. Was that his status in May 1958? A. Yes, sir.

Q. Prior to the accident and at the time of the accident? A. Yes, sir.

Q. Is Colonel Ebaugh an officer of the United States Military Forces?

Mr. Pettibone: I'd like to make your same objec-
720 tion. That calls for a conclusion, which the witness hasn't demonstrated he is qualified to state.

Mr. Wolcott: I think he can answer it. Let him go ahead and answer it.

The Witness: It is my understanding that Colonel Ebaugh is on—Lieutenant Colonel, on active duty and as such is the United States representaive for Property and Fiscal matters in the State of Maryland.

Q. So he is acting as representative of the United States Military organization with respect to Maryland matters, is that it? A. This is my understanding, yes.

Q. When you say Fiscal Officer, does that have to do with disbursing Federal funds? A. Yes.

Q. Insofar as they refer to the Maryland District? A. I don't want to comment on the broad sense of Colonel Ebaugh's duties. Our connection in regard to our budget is that the money for our various projects within the State, which include Air Technician pay and various other services, and what-not that we have to procure, is
721 allocated to the United States Property and Fiscal Officer for our Base, or Bases at that time of May 20. He takes the budget and breaks it down for the two bases in question at that time, Harbor Field and Martin, and these are the appropriated monies that we use for our conduct of our operations.

Mr. Pettibone: Excuse me, Mr. Wolcott, but the duties and responsibilities of Fiscal Officers is set forth in full in Title 38 of the United States Code, which is a matter of record and nothing the witness can say one way or the other will change it or add to it.

Mr. Wolcott: Well, I will also refer to the Code at the appropriate time, Mr. Pettibone.

Mr. Pettibone: Well, I just hoped I might save some time here.

Q. (By Mr. Wolcott) Now, as I understand it, Colonel Ebaugh is the top United States Officer having charge of military property, such as the aircraft assigned to the Maryland Air National Guard?

Mr. Pettibone: I object.

Q. (By Mr. Wolcott) Is that right?

Mr. Pettibone: I object to the form of the question. I don't know what the word "top" means and I can't believe that the witness does.

722

Mr. Wolcott: All right. Is the United States Officer in Maryland that has charge of aircraft assigned for use by the Maryland Air National Guard?

Mr. Pettibone: I object to the form of that question. It is not clear at all what is intended by the question. The witness has already stated that Colonel Ebaugh is the Property and Fiscal Officer of the State of Maryland.

Mr. Wolcott: I know that.

Mr. Pettibone: I don't know what else he can add to that.

Mr. Wolcott: Well, let's find out what he can add to it. Can you answer that question, Colonel?

The Witness: I'm afraid anything I might say in regard to Colonel Ebaugh's duties might be misleading and any conclusion on my part to that question would probably be misleading.

Q. (By Mr. Wolcott) Well, does he supervise in general the use of Government property, military property by the Maryland Air National Guard?

723

Mr. Pettibone: I object to the form of the question, also the meaning of the word "supervise" until it is explained to the witness.

Mr. Wolcott: Well, I definitely will not explain it and I will ask the witness to answer it.

Mr. Mudd: Go ahead.

The Witness: At Air National Guard Base Colonel

Ebaugh has two representatives who are his assistants, one for fiscal and one for property, and the technical supervision of these two individuals is under the United States Property and Fiscal Officer.

Q. (By Mr. Wolcott) What does the Property Assistant do? A. State that again, please.

Q. I say what does the Property Assistant do? What are his duties, as far as you know? You mentioned that he had two assistants, one fiscal and one property, and I am asking you now what the Property Assistant does. A. Well, at the Base we have a Base Supply, which is the recipient of incoming supplies to be issued to the Unit.

We also have our Unit supplies. The Base Supply
724 Warehouse contains the property that is coming into the State for disbursement to the Unit.

Q. Does that include all United States property, such as aircraft and parts? A. I do not know exactly how the aircraft are assigned on paper, but I believe that it does.

Q. All right, and on the fiscal side what does the fiscal—by the way, who is that Property Officer that you refer to?

Mr. Mudd: Present or past?

Mr. Wolcott: At that time.

The Witness: Are you speaking of the Assistant U. S. P. & F. O. Property?

Mr. Wolcott: That's right.

The Witness: That is Major James I. Considine.

Q. (By Mr. Wolcott) And where is he based? A. He is based at Martin.

Q. Is he still there? A. Yes, sir.

Q. All right. Now, on the fiscal side tell us who
725 he is and what his duties are. A. Well, at the time of the accident we did not have a separate Assistant Fiscal Officer for the Martin Airport. The one Assistant U. S. P. and F. O., Fiscal, who was assigned at Harbor Field received the budget allocations for both bases at that time. We had an authorization for one but we were having a little trouble hiring a man at the time of the accident.

Q. And what are the duties of that office? A. To receive the budget allocations, work in conjunction with the Base Detachment Commander on expenditures, keep a running account of their assets and expenditures, and also to render reports from their office.

Q. Does that include the expenditures for maintenance and maintenance employee pay and so on? A. Base accounting system, yes, sir. It could include all these things.

Q. Now, what department or agency prepared the job description for the civil employees?

Mr. Mudd: Will you clarify that to the extent of amend- it to technicians?

Mr. Wolcott: Yes, that would be better. Thank you.

726 Q. (By Mr. Wolcott) Referring particularly to Air Technicians. A. The job descriptions of Air Technicians are contained in the Civilian Personnel Manual, ANGM, 40-01, which is prepared and published under the title of Department of Air Force, National Guard Bureau.

Q. Is Colonel Ebaugh also a member of the Maryland Air National Guard? A. No, he is not.

Mr. Wolcott: Now may I have Exhibit 10, please?

Mr. Pettibone: Sure.

Q. (By Mr. Wolcott) One other question. When a passenger such as Chalmers is taken up does the passenger sign a release, form of release? A. Yes, sir. Policy is that anyone flying in the aircraft not as a crew member signs a release form.

Q. Did Chalmers sign a release form here? A. Yes.

Q. Do you have a copy of it here?

Mr. Pettibone: I'm sorry. I don't have it with me.

Q. (By Mr. Wolcott) Do you have it here, Colonel
727 Kilkowski? A. (Shakes head negatively.)

Mr. Mudd: No, I don't think so.

Mr. Wolcott: Could that be produced, Mr. Pettibone?

Mr. Pettibone: Well, really all I have—

Mr. Wolcott: I don't mean now. I mean at some future time.

Mr. Pettibone: I might say this. We have, the United States, as far as I know at least, has only a copy of it, that being the copy which the Civil Aeronautics Board used at their proceedings and I have the copy which they disseminated at that time. That's all I have myself. I don't know where the original is or who has it.

Mr. Wolcott: Yes. Well, it has been testified that Mr. Chalmers signed one. Off the record.

(Discussion off the record.)

Q. (By Mr. Wolcott) Now, do you recall that form? Who supplies that form? A. I think the form is locally reproduced, reproduction of a form that was illustrated in one of the regulations concerning flying.

728 Q. What regulation is that? You mean the Air Force regulations? A. I believe this regulation is an Air National Guard regulation.

Q. That is one of the regulations I think you testified that are promulgated by the Air Force, is that right? Is that right, sir? A. I think you could probably find better the procedure for issuing regulations from the National Guard Bureau and the Air Force. We do know that it was put out under the Department of Air Force, from the office of the Secretary of the Air Force, Department of Air Force.

Q. Do you recall, Colonel, who is released under that form? Is that a release running to the—to whom? A. I do not recall at this time the wording of the form.

Q. Colonel, do you recall at what time this order dated May 20th, which has been marked Exhibit 10, was cut or issued? A. I don't remember the exact time, no.

729 Q. Do you recall that it was issued sometime later in the day on May 20th? A. I don't remember what time it was issued.

Q. Well, let me ask you this then. Does it often occur that the formal order is cut or issued after the flight has taken off; say at the end of the day the flights are tabulated

and then they are listed on the order? A. It could occur after the flight has taken off; merely a confirmation of the verbal orders that authorize the flight.

Q. And it is merely filling out a form telling what has happened during that day insofar as flights are concerned? A. It is the official record of flying performed by the Unit.

Q. And it is often filled out at the end of the day when they are all summarized and tabulated, is that right, sir? A. Depending upon the amount of flying. Yes, it could be after the flights had taken place; not in all cases. Cases of navigational proficiency flights, it is often possible that the order will precede the flight, so that the man has in his possession a flight order when going to another base, destination.

730 Q. Well, when that order that was cut there Exhibit 10, for Captain McCoy, that was not a navigational proficiency flight, is that right, sir? A. No, sir. Mr. Wolcott, I cannot say what time of the day this order was cut.

Q. I am not asking you that, but I say that was not a navigational proficiency flight? A. No, sir, it was not.

Q. And it is possible that that order may have been cut at the end of the day, is that right, sir? A. It is possible it could have been cut after the flight.

Q. Could the fact that various flights are listed on the same order indicate that?

Mr. Wolcott: I withdraw that question.

Mr. Galiher: May I ask a question?

Q. (By Mr. Galiher) Colonel, from time to time you have referred to Air National Guard. Do you mean Maryland Air National Guard or United States Air National Guard?

Mr. Pettibone: I object to the form of the question. We have no United States National Guard that has

731 been defined in these proceedings by anyone and for that reason I object to the form of the question. It doesn't relate to anything.

Mr. Davidson: National Guard of the United States.

There is the Air National Guard and then the Air National Guard of the United States, I believe. Isn't that correct?

Mr. Pettibone: Yes, but that is different from saying the United States Air National Guard.

Mr. Galiher: I will accept the correction. I apologize. I did not intend to misstate. Now, would you answer it as corrected by Mr. Davidson, Colonel, please?

The Witness: When I use the phrase "Air National Guard" or "Maryland Air National Guard" I am speaking about the Unit personnel of the Unit assigned, which is Federally recognized by the United States.

Q. (By Mr. Galiher) There is an Air National Guard of the United States, is there not? A. Mr. Galiher, I wouldn't care to get into a discussion of the various statuses of the Air National Guard without having the regulation before me.

Mr. Mudd: Just a minute. The question was: There is an Air National Guard of the United States. Now,
732 do you know whether there is or there isn't. If you don't know, say you don't know. If you know, just answer the question.

The Witness: I believe that the Air National Guard—Federally recognized units of the Air National Guard, I should say, constitute the Air National Guard of the United States.

Q. (By Mr. Galiher) Well, in your references then to that organization or in your references using the language that I have asked you about did you have reference to the Maryland Air National Guard or to the Air National Guard of the United States?

Mr. Mudd: Would you amend that to read "or either or both".

Mr. Galiher: All right.

The Witness: When I refer to Maryland Air National Guard I refer to the—

Mr. Galiher: Excuse me. I don't think I put Maryland in. From time to time there have been references to Air National Guard.

The Witness: I am referring to those Air National Guard officers and units which are assigned and
733 Federally recognized by the United States.

Mr. Galiher: I think that's all.

Q. (By Mr. Wolcott) Colonel, I show you this paper which appears to be a photostat of a release and ask you if that is the form of passenger release that you were referring to in your prior testimony? A. It is, sir.

Q. And I believe that you testified that Private Chalmers signed such a release, is that right, sir? A. That's right.

Q. And does this appear to be a photostatic copy of the release that he signed? A. To the best of my knowledge it is a photostat of the release.

Mr. Wolcott: Would you mark that paper, please?

(Photostat was marked Passenger's Exhibit No. 15 for identification.)

Q. (By Mr. Wolcott) I refer you to the signatures on the lower right-hand side of Passenger Exhibit 15 and ask you if you recognize or identify any of those signatures?

A. You said lower right-hand, or lower left-hand?
734 Q. Lower right-hand, sir. I mean left-hand. A. Yes, I recognize all three.

Q. Could you read them off as they appear, reading from the top down? A. J. R. McCoy.

Q. Who is he? A. He is the Captain.

Q. That is Captain McCoy? A. Captain McCoy.

Q. All right. A. W. G. Zinkand.

Q. Can you identify him, please? A. He is an Air Technician clerk in Operations.

Q. Right. A. And the first name is not clear on the last one, but I believe it is—it is obscured. I can't make it out. It appears to be Vinson, who at that time I believe was also a clerk in operations.

Mr. Wolcott: Thank you, Colonel.

(Examination of witness concluded.)

735 Mr. Mudd: The signing, insofar as I am concerned, and the filing are waived, but I reserve the right to have the witness read over the transcript of the deposition before it is considered as approved.

Mr. Davidson: Mr. Pettibone, is the Government's position substantially the same?

Mr. Pettibone: Yes.

Mr. Davidson: All right. Agreeable with the passengers.

* * * * * * * * * * *

Plaintiff's Exhibit 15, National Guard Regulations No. 75-16

*NGR 75-16

National Guard Regulations No. 75-16

DEPARTMENT OF THE ARMY

Washington 25, D. C., 29 December 1947

ACCOUNTING CLERKS AND CARETAKERS

	Paragraph
Authority	1
Definitions	2
Number	3
Qualifications	4
Travel	5
Rates of pay	6
Payment	7
Funds	8
Reports	9
Attendance at field training	10
Detached service	11
Leave	12
Attendance of clerks and caretakers at military service schools (Air and Army)	13
Blank forms	14

* This pamphlet supersedes NGR 75-16, 5 August 1938, and NGR Circulars No. 6, 7 May 1938, No. 8, 30 August 1946, No. 6, 20 August 1946, No. 20, 28 November 1946, No. 4, 25 November 1947, and No. 23, 29 December 1947.

1. Authority.—Accounting clerks and caretakers referred to in these regulations are employees authorized under the provisions of section 90, National Defense Act, for the administration and care of material, armament, vehicles, and equipment provided for the National Guard and used solely for military purposes. The Secretary of the Army has delegated to the several adjutants general of States, Territories, and the District of Columbia, authority to employ, fix rates of pay, establish duties and work hours (not to exceed 40 hours per week), and to discharge employees within the purview of this regulation; subject to the provisions of law and such instructions as may from time to time be issued by the Chief, National Guard Bureau.

2. Definitions.—The following definitions are applicable:

a. Accounting clerks are male or female civilian employees authorized by law for accounting and property custodial duties in the office of the United States property and disbursing officer.

b. Caretakers (Army) are male civilian employees authorized as supervisors, mechanics, and technicians. They may be divided into two main categories.

(1) *Unit caretakers.*—Employees who work directly under the supervision of a company or similar unit commander and are responsible to that commander for the care, maintenance, and repair of the unit equipment.

(2) *Pool maintenance caretakers.*—Employees who work in or from fixed shops, under the direction of shop or pool supervisors and under the general supervision of the State maintenance officer. They are responsible for the inspection, repair, and reconditioning of equipment pertaining to National Guard organizations.

c. Caretakers (Air) are male civilian employees authorized by law for maintenance, repair, and inspection of equipment issued to the National Guard Air units.

3. Number.—The number of accounting clerks and caretakers authorized to be paid from Federal funds in each State will be announced periodically by the Chief, National Guard Bureau. This number will be based on geographic considerations, troop strengths, the amount and types of equipment issued to the State, and upon funds made available for the National Guard. The number of personnel actually paid from Federal funds may exceed the total specified from time to time by the Chief, National Guard Bureau, if employments is on a part-time basis and funds allotted for each job are not exceeded.

4. Qualifications.—The several adjutants general will satisfy themselves that personnel paid from Federal funds are capable of performing the duties for which employed. The following qualifications are mandatory:

a. Accounting clerks must be able to perform the duties outlined in applicable Army job specifications and such additional duties, pertaining to the office of the United States property and disbursing officer, as may be assigned them.

b. Caretakers (Army).

(1) Unit caretakers must be members of the National Guard and of the unit for which employed. They must be qualified to perform maintenance, at the organizational level, on the equipment for which the unit commander will be responsible. Such qualifications will be determined by appropriate aptitude tests.

(2) Pool maintenance caretakers must be members of the National Guard and should be members of the parent unit of the pool to which they are assigned. If the appropriate MOS is not authorized in the parent

unit, caretakers may be enlisted in a related MOS for which they are qualified, or may be members of any other National Guard unit. They will be given appropriate aptitude tests, prior to employment, to establish their ability to perform the duties outlined in applicable Army or National Guard job specifications, as well as any additional duties pertaining to the reception, inspection, storage, issue, and maintenance of National Guard property, which may be assigned. Aptitude test forms have been furnished by the National Guard Bureau as a guide in the screening of applicants.

(3) Commissioned officers may be employed as caretakers only in the supervisory positions listed below. Enlisted personnel will not be hired in these positions. Warrant officers will not be employed as the senior supervisor in any pool.

State maintenance officer.
Supervisor, artillery maintenance and repair.
Supervisor, automotive maintenance and repair.
Supervisor, engineer equipment and maintenance.
Supervisor, ordnance maintenance service.
Supervisor, signal maintenance and repair.
Supervisor, tank maintenance and repair.

c. Caretakers (Air) must be members of the National Guard and must be able to perform the duties specified for the particular job in AAF Manual 35-0-1 "Military Personnel, Classification and Duty Assignment," 3 April 1944 (as revised) or WD TM 12-427 "Military Occupational Classification of Enlisted Personnel," 12 July 1944 (as revised). However, they may be trained in additional duties as may be required by the unit commanders. Commissioned officers of the National Guard Air units may be employed as caretakers only in the Military Occupational Specialty positions indicated in current chart for Permanent Caretaker Detachment, National Guard Air units.

5. Travel.—Travel of accounting and caretaker personnel, essential to proper performance of their official duties, is authorized. Pertinent instructions will issue from the Chief, National Guard Bureau.

6. Rates of pay.—The maximum pay scale for accounting clerks and caretakers will be announced periodically by the Chief, National Guard Bureau. Actual rates of pay will be fixed by the several adjutants general within the limitations prescribed. Total payment from Federal funds will not exceed the allotment for that purpose, but supplemental payments may be made from other sources. No compensation will be paid from Federal funds for overtime work performed by accounting clerks and caretakers. Salaries paid to employees who are members of the National Guard will be in addition to any compensation authorized by law for members of the National Guard.

7. Payment.—a. Caretakers and accounting clerks will be paid monthly or semimonthly on Standard Form 1128 by the finance officer designated to pay National Guard vouchers for the State concerned.

b. Caretakers and accounting clerks will be listed under separate headings on pay rolls with job title of each individual stated below his name, followed by essential remarks. Two official or true copies of the order appointing an employee, showing job title and rate of pay, will be filed with the first pay roll on which he is paid. Two official or true copies of the order relieving an employee will be filed with the pay roll on which he is last paid. Whenever the job title and/or salary of an employee is changed, the change will be covered by an order showing the new title and/or the new salary, and two official or true copies of the order will be filed with the pay roll covering the first payment at the new rate.

c. Where pay data for all employees paid at a station cannot be entered on one copy of the Standard Form 1128,

additional copies may be used as continuation sheets. In such cases, page 1 of the pay roll will contain the necessary pay roll certifications and summary, with the continuation sheets securely fastened thereto. The original and two copies of the pay roll, together with the orders referred to in b above will be forwarded to the designated finance officer. After payment of the roll, the disbursing officer will enter complete voucher references and check numbers on the triplicate copy of the pay roll and return it to the certifying officer.

d. Pay rolls will be certified by the bonded United States property and disbursing officer and approved by the State adjutant general or an officer designated by him.

8. Funds.—The several adjutants general will submit quarterly requests to the Chief, National Guard Bureau for allotment of funds for pay of accounting clerks and caretakers, on WD NGB Form 42, "Request for Allotment of Funds for the Employment of Administrative, Clerical, Maintenance, and Custodial Personnel." Army and Air Force personnel will not be shown on the same sheet. Requests will be forwarded to reach the National Guard Bureau no later than the 15th day of the month next preceding the quarter for which funds are desired.

9. Reports.—Reports will be rendered monthly showing all employees paid from Federal funds, as of the first day of the month, on WD NGB Form 103, "National Guard Civilian Personnel." Army and Air Force personnel will not be shown on the same sheet. Reports will be forwarded to reach the National Guard Bureau no later than the 7th day of the month.

10. Attendance at field training.—Unless specifically authorized by the Chief, National Guard Bureau to remain at their home stations, caretakers will attend field training with their units. Requests for authority to remain at home stations must show what property is to be left, why it is

necessary to leave it, and why such property requires the attention of caretakers during the period of encampment.

11. Detached service.—When property assigned permanently to one unit is loaned to another unit, one or more caretakers from the responsible unit may accompany the property and remain with it to observe the care accorded it and to assist in its maintenance. Requests for this detached service will be submitted to the Chief, National Guard Bureau, in letter form listing the names and stations of the caretakers and the inclusive dates of the period of duty involved. When this duty is to be performed in connection with field training, the letter will be attached to the estimate for field training (WD NGB Form 39) to which the detached service pertains. When requests are approved by the Chief, National Guard Bureau, the State will issue the order placing the designated caretaker or caretakers on detached service. Orders will refer to paragraph 11, NGR 75-16, and the National Guard Bureau authorization, and will specify the number of days of detached service, together with the inclusive dates. When detached service is in connection with field training no per diem will be allowed. Within the limits of funds available, payment of travel expenses and per diem in connection with such detached service will be made from funds allotted to States for travel of accounting, custodial, and maintenance personnel.

12. Leave.[1]—State adjutants general are authorized to grant accounting employees and caretakers annual leave, sick leave, and military leave (all with pay) in accordance with the provisions of *a, b; c,* and *d* below. They will maintain a record of all absences from official duty, the duration of each absence, and its cause.

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[1] The provisions of paragraph 12 will not apply to accounting clerks and caretakers employed by the District of Columbia National Guard. The leave privileges of these employees are covered by Federal statutes which have been cited to the Adjutant General of the District of Columbia by separate instrument.

a. Annual leave.—Employees are entitled to 15 days annual leave with pay each calendar year. Annual leave is credited to the employee's leave account at the rate of 5 hours per pay period for employees paid bimonthly and 10 hours per pay period for employees paid monthly.

(1) The minimum credit of annual leave is 5 hours and additional credits are in multiples of 5 hours.

(2) Annual leave may be accumulated up to 30 days.

b. Sick leave.—Employees accrue sick leave at the rate of 1¼ days per month. The monthly accrual of sick leave will be credited to the employee's leave account at the beginning of the calendar month.

(1) The minimum credit of sick leave is 5 hours and additional credits are in multiples of 5 hours.

(2) Sick leave may be accumulated up to 15 days.

c. Military leave.—Military leave not to exceed 15 days will be granted to accounting clerks, who are also members of the National Guard, and to caretakers, for the purpose of attending annual field training of the units to which they are assigned. Such leave will be granted without prejudice to their pay as accounting clerks and caretakers or their pay as members of the National Guard. In this respect their status will correspond to that of Federal employees who are also members of the National Guard.

d. Miscellaneous provisions.—

(1) Leave accrues to an employee while in a leave with or without pay status, provided he returns to duty, or provided failure to return to duty is due to death, disability, retirement for disability, or reduction in force. Evidence of disability must be supported by an acceptable medical certificate.

(2) Leave credits will be reduced when an employee's total absence in a nonpay status during a calendar

year equals or exceeds 88 hours. The reductions are at the rate of 5 hours annual leave, and 5 hours sick leave, for each such period. When an employee absent because of injury received in line of duty requests that he be carried on leave without pay, he is entitled, upon his return to duty, to receive credit for accrued leave covering the period for which he was paid disability compensation by the Bureau of Employees' Compensation.

(3) The value of the leave credit day is established at 8 hours, irrespective of the number of hours worked a day.

(4) The leave year for purposes of this authority commences for each individual with the date of employment.

(5) When an employee's services are to be terminated, every effort will be made to allow him to take any accrued annual leave.

(6) Leave accumulated in excess of amounts stipulated in *a* and *b* above will be automatically forfeited.

(7) Cash settlement of accrued leave is not authorized.

(8) Absent time on holidays, or at any time other than the hours of work prescribed by the adjutant general, need not be charged to leave.

(9) Sick leave not to exceed 15 days may, in the discretion of the State adjutant general, be advanced. Such advances will be made only after all accrued annual and sick leave have been used, and will be charged against future accruals of sick leave. Any amount not covered by accruals at time of separation will be deducted on final pay roll settlement.

13. Attendance of clerks and caretakers at military service schools (Air and Army).—*a.* Members of the

National Guard employed as clerks or caretakers by the States, and paid from National Guard funds, are authorized to attend military service schools and to participate in courses of practical instruction at specified military installations, without prejudice to their civilian pay. The following will apply:

(1) The applicant must be a member of a federally recognized National Guard unit.

(2) Leave of absence will be granted for a period not to exceed 90 days. While absent, the student, if an enlisted man, will be counted as constructively present for purposes of determining percentage of drill attendance for his unit. Specific authority for leave of absence for a period in excess of 90 days will be requested from the Chief, National Guard Bureau, in those instances in which the course of instruction exceeds 90 days.

(3) In general, no replacement will be provided in civilian and military vacancy while the individual is away from home station. In exceptional cases requests for temporary replacements in Air units with full justification therefor may be submitted to the Chief, National Guard Bureau. In cases affecting Army units, the employment of substitute personnel to replace individuals attending service schools under the provisions of this regulation will *not* be authorized.

(4) Generally, attendance will be in a civilian status. While in attendance National Guard personnel will be subsisted and quartered in accommodations with their National Guard rank or grade or as may be prescribed by the local post or base commander concerned. The United States Air Force requires attendance in uniform at United States Air Force schools.

(5) The adjutant general of the State concerned, on authority of the Chief, National Guard Bureau, will

issue orders for the student, as a civilian or as otherwise authorized, to proceed on temporary duty to the installation providing the instruction, and upon completion or when otherwise relieved by the commandant or the commanding officer to return to proper station.

(6) The United States property and disbursing officer of the State concerned will make arrangements for travel and for the payment of civilian wage and the prescribed per diem.

(7) The per diem rate will be $6.00 for each day or part thereof the individual is in a travel status.

(8) When in attendance in a civilian status the per diem rate for days actually at the installation providing instruction will be in the amount required to meet actual expenses for meals, quarters, including service charges, and may not exceed $4.00 per day. If attending in a military status, the per diem will be as prescribed in pertinent regulations.

(9) The individual will pay for the necessary subsistence and quarters at the rates prescribed by the commander of the installation where he is in attendance.

(10) Applications for authority to attend these schools will be processed in the same manner as applications for any other individual to attend a military service school.

(11) An employee selected to attend any of these courses of instruction, if an enlisted man, will be discharged and reenlisted prior to acceptance of such detail.

(12) Personnel attending these schools will be entitled to the same benefits under the Federal Compensation Act as they now enjoy.

b. Adjutants general will make every effort to select qualified employees and appropriate courses to insure maxi-

mum benefits in increased efficiency of operation. [CSGOT 300.3 (NGB Cir (24 Dec 47)).]

14. Blank forms.—The following is a list of the blank forms referred to in these National Guard Regulations. The list shows the number and title of each form and the paragraphs of this NGR dealing with the form. The following NGB forms are obtainable from the National Guard Bureau. The Standard Form may be obtained from The Adjutant General.

Number of form	Title of form	Reference (pg.)
Standard Form 1128	Pay Roll for Personal Services	7
WD NGB Form 39	Estimate for Field Training (Fund)	11
WD NGB Form 42	Request for Allotment of Funds for the Employment of Administrative, Clerical, Maintenance, and Custodial Personnel	8
WD NGB Form 103	National Guard Civilian Personnel	9

[CSUSA 325 (28 Aug 47)]

By Order of the Secretary of the Army:

KENNETH F. CRAMER
Major General
Chief, National Guard Bureau

NGR 75-16

ACCOUNTING CLERKS AND CARETAKERS

Department of the Army
Washington 25, D. C. 16 April 1948

Change No. 1

NGR 75-16, 29 December 1947, is changed as follows:

1. *Authority.*—Accounting clerks and caretakers referred to in these regulations are employees authorized under the provisions of section 90, National Defense Act, for the administration and care of materiel, armament, vehicles, and equipment provided for the National Guard and used solely for military purposes. The Secretary of the Army has delegated to the several adjutants general of States, Territories, and the District of Columbia, authority to employ, fix rates of pay, establish duties and work hours, and to discharge employees within the purview of this regulation; subject to the provisions of law and such instructions as may from time to time be issued by the Chief, National Guard Bureau.

[CSGSP/B1 15628]

12. Leave.—State adjutants general are authorized to grant accounting employees and caretakers annual leave, sick leave, and military leave (all with pay) in accordance with the provisions of *a*, *b*, *c*, and *d* below. They will maintain a record of all absences from official duty, the duration of each absence, and its cause.

* * * * * * * * * * *

d. Miscellaneous provisions.

* * * * * * * * * * *

(7) Cash settlement of accrued leave is not authorized

with the exception of claims for accrued leave due a deceased employee.

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[CSGSP/B1 14615]

By Order of the Secretary of the Army:

KENNETH F. CRAMER
Major General
Chief, National Guard Bureau

Plaintiff's Exhibit 16, National Guard Regulations No. 75-16

(*Superceded*)

*NGR 75-16

NATIONAL GUARD REGULATIONS
No. 75-16

DEPARTMENT OF THE ARMY
WASHINGTON 25, D. C., *7 January 1953*

FIELD CIVILIAN PERSONNEL

	Paragraph
Purpose	1
Authority	2
Definitions	3
Number to be employed	4
Qualifications	5
Appointment of personnel	6
Place of employment	7
Travel	8
Rates of Pay	9
Part-time employment	10
Payment	11
Funds	12

* These regulations supersede NGR 75-16, 29 December 1947, including C 1, 16 April 1948; C 3, 3 February 1950, and C 3, 1 March 1950; and NGB Circulars No. 4, 1950, No. 3 and No. 5, 1951.

Reports 13
Training 14
Temporary duty 15
Leave 16
Attendance at service schools 17
Restoration of employees after a period of active military service with the armed forces of the United States 18

1. Purpose.—The purpose of these regulations is to outline the qualifications, duties, rights and obligations of the following personnel (hereinafter referred to collectively as "National Guard civilian personnel"): administrative assistants; accounting clerks; maintenance personnel; range-keepers; and administrative, supply and maintenance technicians, and to prescribe the procedure for the payment of these individuals.

2. Authority.—National Guard civilian personnel referred to in these regulations are employees authorized under the provisions of Section 90, National Defense Act, for administrative and accounting duties, maintenance, repair and inspection of materiel, armament, vehicles, and equipment provided for the National Guard and used solely for military purposes. The Secretary of the Army has delegated to the adjutants general of the several States, Territories, Puerto Rico, and the District of Columbia, the authority to employ, fix rates of pay, establish duties and work hours (a minimum of 40 hours per week), supervise, and discharge employees within the purview of these regulations; subject to the provisions of law and such instructions as may from time to time be issued by the Chief, National Guard Bureau. (32 U. S. C. A. 42 and 42a; G. O. No. 96, Dept. of the Army, 9 Nov 51.)

3. Definitions.—The following definitions are applicable:

a. Administrative assistants are federally recognized officers, warrant officers or enlisted men employed as civilians to act as civilian administrative assistants to

commanders in the performance of such duties, responsibilities and administrative matters for which the commanders are responsible, or may be required to perform.

b. Accounting clerks are male or female civilian employees authorized by law for accounting and property custodial duties in the office of the United States Property and Disbursing Officer.

NGR 75-16
*C 3

Changes now in force: C 3

FIELD CIVILIAN PERSONNEL

DEPARTMENT OF THE ARMY
WASHINGTON 25, D. C., *17 February 1955*

CHANGES
No. 3

NGR 75-16, 7 January 1953, is changed as follows:

5. Qualifications.—The adjutants general * * * qualifications are mandatory:

* * * * * * *

c. (1) * * * (As added by Changes No. 1) In event of emergency (order to active duty of the parent unit, etc.), the Chief, National Guard Bureau, may waive the requirement that pool maintenance employees must be members of the National Guard.

* * * * * * *

(4) (As added by Changes No. 1) Commissioned officers may be employed as pool maintenance employees in the position of Repairman, Radar Reporting Equipment.

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* These changes supersede C 1, 19 October 1953, and C 2, 19 November 1954, to NGR 75-16.

7. Place of employment.—National Guard civilian * * * than Federal funds.

* * * * * * *

d. (As superseded by Changes No. 1) Accounting, clerical, and custodial employees are authorized for the office of the USP&FO, equipment concentration sites, and for the office of the State maintenance officer.

* * * * * * *

16. (Superseded) Leave.—Leave not to exceed that authorized below may be granted to National Guard civilian personnel. A record of absences from official duty, the duration of each absence, and as cause, will be maintained by each State.

Note.—The provisions of this paragraph will not apply to personnel employed under these regulations by the District of Columbia National Guard. The leave privileges of these employees are covered by Federal statutes which have been cited to the Adjutant General of the District of Columbia by separate instrument. The provisions of this paragraph do not apply to temporary civilian employees of the National Guard.

a. Annual leave.

(1) Annual leave is accrued at the rate of 5 hours per pay period if paid semimonthly, or 10 hours per pay period if paid monthly.

(2) The minimum credit of annual leave is 5 hours and additional credits are in multiples of 5 hours.

(3) Annual leave may be accrued in excess of 240 hours but no more than 240 hours may be carried forward from one calendar year to the next.

(4) Annual leave will be credited at the end of the pay period.

b. Sick leave.

(1) Sick leave is accrued at the rate of 5 hours per pay period if paid semimonthly or 10 hours per pay period if paid monthly.

(2) The minimum credit of sick leave is 5 hours and additional credits are in multiples of 5 hours.

(3) Sick leave will be credited at the end of the pay period.

(4) Sick leave accruing to an employee's credit which is not used during the year in which it is earned may accumulate from pay period to pay

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service, would be otherwise eligible and qualified for restoration, the State adjutant general should request the appropriate State authorities to place such an employee in some other suitable State position.

(7) When two persons are eligible and qualified for the same position, it is recommended that the employee entering the active military service with the unit concerned be given preference in restoration to employment.

[NG—AREXP 325.1 (NGR 75-16) Gen (15 Aug 52)]

BY ORDER OF THE SECRETARY OF THE ARMY:

Official:

DAVID S. RUMBOUGH
Colonel, NGB
Executive
National Guard Bureau

RAYMOND H. FLEMING
Major General
Chief, National Guard Bureau

Plaintiff's Exhibit 17. ANGR 40-01

Air National Guard Regulation No. 40-01B

ANGR 40-01B
10
Department of the Air Force
Washington, *20 May 1955*

CIVILIAN PERSONNEL

AIR NATIONAL GUARD PERSONNEL

ANGR 40-01, 20 December 1954, is changed as follows:

Delete paragraph 10. b. (9) and substitute the following:

10. Pay and Per Diem:

* * * *

b. *Per Diem:*

* * * *

(9) Air National Guard civilian personnel authorized to attend approved supplemental exercises where government messing facilities are not available shall be entitled to an allowance of not to exceed 85¢ for each meal to which entitled while participating in the exercise. At installations where government messing facilities are available these personnel may be authorized an allowance for subsistence of not to exceed $1.60 per day. From this allowance individuals are expected to purchase meals at the rate applicable for officers not in a per diem status. In all instances where meals are furnished these personnel free of charge, no reimbursement for subsistence is authorized. If the exercise is of such duration that quarters are required but government quarters are not avail-

able, an allowance of not to exceed $3.50 per day may be paid.

BY ORDER OF THE SECRETARY OF THE AIR FORCE:

OFFICIAL:

T. H. BAXTER
Colonel, USAF
Executive
National Guard Bureau

DISTRIBUTION:
"B"

EDGAR C. ERICKSON
Major General
Chief, National Guard Bureau

Air National Guard Regulation No. 40-01A
ANGR 40-01A
10

Department of the Air Force
Washington, *15 February 1956*

CIVILIAN PERSONNEL

AIR NATIONAL GUARD CIVILIAN PERSONNEL

ANGR 40-01, dated 20 December 1954, is changed as follows:

Add the following subparagraph to paragraph 10:

10. Pay and Per Diem:

* * * * *

f. *Claims—Deceased Air Technicians:*

(1) Claims for pay and/or allowances due deceased air technicians will be forwarded to the National Guard Bureau for review and submission to the United States General Accounting Office for settle-

ment. Outstanding United States Treasury checks which may have been issued but not cashed by the decedent are to be inclosed with the claims.

(2) Preparation of Claim and Supporting Documents:

(a) Standard Form 1055, "Claim Against the United States for Amounts Due in the Case of a Decedent," (one copy) will be prepared. When a legally appointed representative of the estate of the decedent is filing the claim, a certificate of letters testamentary or of administration must accompany the claim.

(b) The same pay roll or voucher form (four copies) which would be used for payments under normal circumstances will be prepared. The name, address, and capacity of the payee will be left blank. A determination of eligible payee will be made by the United States General Accounting Office, from information furnished, at which time the payee block of the pay roll or voucher will be completed.

(c) The pay roll will be submitted in four copies and will include the following information as appropriate.

1. Certification of funds if payment is to be made from current appropriations.

2. Amount of unused leave credit at date of death. If none, so indicate.

3. Pay periods and rate of pay.

4. Date of which last paid and in what Finance Officer's accounts (month, name, and symbol number).

5. Date of death.

6. If claim is for travel or per diem allowances, include copies of orders under which travel was performed together with a complete itinerary.

BY ORDER OF THE SECRETARY OF THE AIR FORCE:

OFFICIAL:
THURSTON H. BAXTER
Colonel, USAF
Executive
National Guard Bureau

DISTRIBUTION:
"B"

EDGAR C. ERICKSON
Major General
Chief, National Guard Bureau

Air National Guard Regulation No. 40-01
40-01A 15 Feb.
40-01B 20 May

* ANGR 40-01
1-2
Department of the Air Force
Washington, *20 December 1954*

CIVILIAN PERSONNEL

AIR NATIONAL GUARD CIVILIAN PERSONNEL

SECTION I—GENERAL

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* This Regulation supersedes ANGR 40-01, 7 July 1952, and ANGR 40-01A, 22 September 1953.

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SECTION I—GENERAL

1. Purpose. This Regulation provides a manning guide for the Air National Guard civilian personnel program and establishes policies and procedures applicable to Air National Guard civilian personnel.

2. Policy:

a. Air National Guard civilian personnel shall be utilized to effect maximum efficiency in administration, supply, operations, training, and maintenance of the Air National Guard.

b. Air National Guard civilian personnel must be federally recognized members of the Air National Guard of the State, Territory, Puerto Rico, or the District of Columbia except for the employment of:

(1) Females (when specifically authorized by the Chief, National Guard Bureau).

(2) Temporary personnel paid from funds other than those designated for the pay of air technicians.

c. Officers will not be appointed to Air National Guard civilian personnel positions authorized for airmen, nor will airmen be appointed to positions authorized for officers.

d. The authorized grade and position titles may not be altered or changed.

e. Airmen type air technician positions may be transferred to other units or organizations, or the position may be changed to another authorized position at the discretion of the State adjutant general, except that such positions may not be transferred to or from Headquarters, State Air National Guard without prior approval of the Chief, National Guard Bureau.

f. Officer type air technician positions may not be transferred or changed without prior approval of the Chief, National Guard Bureau.

g. Air National Guard technician positions will not be transferred to Army National Guard units.

h. Air National Guard civilian personnel may not accept outside employment which interferes or conflicts with the performance of their Air National Guard civilian duties.

i. Air National Guard civilian personnel will occupy the T/O vacancy most comparable to their civilian position.

j. Warrant officers will be considered to be in the same category as commissioned officers in this regulation.

k. Officers required to meet a Federal recognition board should not be employed prior to receipt of Federal recognition, and any individual if so employed accepts such employment at his own risk. Officers exempted from meeting a Federal recognition board may be employed and paid from the date the individual is appointed. Airmen may be employed upon completion of the oaths of enlistment.

l. The authority governing matters pertaining to Air National Guard civilian personnel is contained in this regulation and will be quoted as reference in special orders and other official action.

3. Authority:

a. Basic authority for the employment of Air National Guard civilian personnel is contained in Section 90, National Defense Act, as amended.

b. Authority is delegated to the adjutants general of the several States, Territories, Puerto Rico, and the District of Columbia, to employ, fix rates of pay, establish work hours (a minimum of 40 hours per week), supervise, and discharge employees within the purview of this regulation; subject to the provisions of law and such instructions as may be subsequently issued by the Chief, National Guard Bureau.

4. Status. Air National Guard civilian personnel are considered to be employees of the State, Territory, Puerto Rico, or the District of Columbia (21 Comp Gen Dec. 305).

5. Definitions. For the purpose of this Regulation:

a. "Air National Guard civilian personnel" means any and all civilians employed by the several States, Territories, Puerto Rico, and the District of Columbia, permanent or temporary, male or female, supported wholly or in part by Federal funds appropriated for that purpose, including but not limited to the following:

(1) "Air technician" means a person employed for the performance of the duties of positions listed on the manning guide and paid from funds designated for the pay of air technicians.

(2) "Temporary employees" means and includes persons employed for a temporary period for the performance of duties of positions which are not listed on the manning guide and who are not paid from funds designated for the pay of air technicians.

(3) "Temporary air technicians" means and includes personnel employed for a period of 90 days or less for the performance of duties listed on the manning guide and paid from funds designated for the pay of air technicians.

b. "Air National Guard civilian detachment" means and includes the Air National Guard civilian personnel of any unit, organization, office, base, or installation.

c. "Man day" is a unit of measure meaning the employment of one person for one day.

d. "Man month" is a unit of measure meaning the employment of one person for one month, two persons for fifteen days, or three persons for ten days, etc.

e. "Man years" is a unit of measure meaning the employment of one person for one year, two persons for six months, or three persons for four months, etc.

f. "Special project" means a specific job or mission identified by title.

6. Qualifications. Air National Guard civilian personnel shall be qualified as follows:

a. Technically qualified to perform the duties of the position for which being employed without further schooling or training at the expense of the government; *and*

b. Physically qualified for active Federal service if the position for which employed requires membership in the Air National Guard.

7. Appointment:

a. *Authority.* Appointment of Air National Guard civilian personnel is a function of the adjutant general.

Defendant's Exhibit 1, General Orders

MILITARY DEPARTMENT
STATE OF MARYLAND
OFFICE OF THE ADJUTANT GENERAL
FIFTH REGIMENT ARMORY
BALTIMORE

General Orders — 5 August 1956
Number 47 — Section

* * * * *

III. The National Guard Bureau has extended Federal recognition to following officers of the Maryland National Guard effective dates indicated:

Capt Julius R. McCoy, AF, 104th Ftr Intcp sq — 1 Jul 56

* * * * *

By Order of the Governor:

MILTON A. RECKORD
Major General
The Adjutant General

Official:

STATE OF MARYLAND
MILITARY DEPARTMENT
FIFTH REGIMENT ARMORY
BALTIMORE

General Orders
No. 24

31 March 1952
Section

* * * * *

II. The National Guard Bureau, Department of the Army, extends federal recognition to the following named officer of the Maryland National Guard, effective from the date indicated:

2nd Lt Julius Rossey McCoy, AF,
(assigned Pilot, 104th Fighter Sq),
to date from 25 January 1952.

By Order of The Governor:

MILTON A. RECKORD
Major General
The Adjutant General

Official:

STATE OF MARYLAND
MILITARY DEPARTMENT
FIFTH REGIMENT ARMORY
BALTIMORE

General Orders
No. 9

31 January 1952
Section

* * * * *

I. The following appointments and assignments in the Maryland National Guard have been made and commissions issued accordingly:

* * * * *

(d) Julius R. McCoy, 0784050, Esq., Baltimore City,
to be
2d Lieutenant, Air Force

with rank from 25 January 1952

The officers named above are assigned to duty as follows:
104th Fighter Sq: Lt McCoy as Pilot

* * * * *

By Order of The Governor:

MILTON A. RECKORD
Major General
The Adjutant General

Official:

A Certified True Copy
MILLARD F. HAMBLIN, JR.
Millard F. Hamblin, Jr.
Captain, USAF
Acft Acdt Board Recorder

Defendant's Exhibit 2. Special Order No. 93

STATE OF MARYLAND
OFFICE OF THE ADJUTANT GENERAL
FIFTH REGIMENT ARMORY
BALTIMORE

Special Orders 13 May 1958
WR. 93

EXTRACT

4. PAC in ANGR 40-01 as amended, and letter NO-AFSTP (With inclosures) dated 21 March 1958, Subject: "Air National Guard Civilian Personnel Program", the Air Technician positions of the following named Air Technicians, 104th Fighter-Interceptor Squadron MdAFNG, are changed as follows, effective 16 May 1958:

Name of Air Technician	From	To
* * * * * * * * * *		
Julius R. McCoy	Base Maint Supervisor NGC-11 82 eff 16 Dec 57 line 75, ATD Man Doc	Acft Maintenance Chief NOMS-9, 83 eff 16 May 58 line 74, ATD Man Doc
* * * * * * * * * *		

Official:
/s/ Benjamin F. Cassell
/t/ BENJAMIN F. CASSELL
Colonel, AGC, MdARNG-Assistant
Distribution:
C/S MdANG (5)
Cmdr, 104th FIS (140)
"A Certified True Extract Copy"
GEORGE J. WINDISH
George J. Windish
Captain, MdANG
Adjutant

By Order of the Governor
MILTON A. RECKORD
Major General
The Adjutant General
Asst USP&FO (Fiscal) Air (10) USP&FO (39)
Asst USP&FO (Prop) Air (10) Files (29)

Defendant's Exhibit 3. Local Flying Area S.O.P. No. 3

OFFICE OF THE OPERATIONS OFFICER
104TH FIGHTER-INTERCEPTOR SQUADRON
MARYLAND AIR NATIONAL GUARD
HARBOR FIELD, BALTIMORE, MD.

2 January 1957

STANDING OPERATING PROCEDURE
NUMBER 3

LOCAL FLYING AREA

1. Purpose: To establish the *Local Flying Area* and the *Acrobatic* and *Test Flight Areas* to be used by this unit.

2. *Scope:* The provisions of this S.O.P. are applicable to all pilots flying aircraft assigned or attached to this organization.

3. *Local Flying Area:* All Local Flights in aircraft assigned to this unit will be confined to an area within a

radius of 100 nautical miles from the home base. The Local Flying Area is outlined for visual reference on the Local Area Map in the briefing room. The boundaries are as follows: From Selinsgrove, Pa. on the North, Southeast to McGuire AFB, South to Atlantic City, N. J., thence along the coast of the Delmarva Peninsula to Chincoteague N.A.S., West to Tappahannock, Va., Northwest to Front Royal, Va., thence Northeast to Martinsburg, Chambersburg and Selinsgrove, Pa.

a. Aircraft assigned to this unit will not be flown over the cities of Baltimore and Washington below 10,000 feet unless it becomes necessary to do so in a practice or actual instrument approach, or if on a specifically briefed mission.

4. *Acrobatic Area:* All *Acrobatic Flights* will be confined to the *Acrobatic Area* as outlined on the Local Area Map in the briefing room. Acrobatic Flights will never be performed on airways or over cities, towns, or assemblies of people, nor will they be performed below 5000 feet mean sea level. At no time will acrobatics be flown in other than the *Acrobatic Area* unless specifically briefed by the Commander or his authorized representatives. The boundary of the Acrobatic Area is as follows: The Northern boundary is Airway Red 73 to Red 72 on the East to Green 5 on the Southeast to Red 17 on the South and along the Eastern edge of the Aberdeen Danger Area on the West.

5. *Flight Test Area:* All Engineering Test Flights will be accomplished within the Flight Test Area, which is outlined for visual reference on the Local Area Map in the briefing room. The Flight Test Area is bounded by Friendship International Airport, the Glenn L. Martin Co. Airport, Patuxent Naval Air Station, and Andrews Air Force Base.

This is a Certified True Copy
JOHN D. WEBB, JR.
John D. Webb, Jr.
Major, USAF

Defendant's Exhibit 4-Passenger in Aircraft, S.O.P. No. 9

OFFICE OF THE OPERATIONS OFFICER
104TH FIGHTER INTERCEPTOR SQUADRON
MARYLAND AIR NATIONAL GUARD
HARBOR FIELD, BALTIMORE, MD.

16 January 1957

Standing Operating Procedure Number 9

PASSENGERS IN AIRCRAFT

1. *Purpose & Scope:* This S.O.P. establishes the policy of this unit regarding passengers and is applicable to *ALL* personnel who fly as passengers in aircraft assigned or attached to this unit.

2. It will be the pilot's responsibility to brief all crew members and/or passengers on the following:

a. Proper fit and utilization of emergency equipment (parachute, mae-west, crash helmet, oxygen mask, etc.).

b. Signals to be used for bail-out or ejection.

c. Emergency exits and duties of crew members during an emergency.

3. All passengers who are not on flying status will execute a release, which will be filed in Operations.

4. Passengers in jet aircraft will not be flown above eighteen thousand (18,000) feet *mean sea level* unless they have been through the altitude indoctrination chamber.

5. Pilots with less than ten (10) hours first pilot time in the type aircraft concerned, *will not* be permitted to take up passengers.

6. Personnel who are not members of this unit will not ride as passengers without permission of the Commander.

By Order of the Commander:

JOSEPH J. MAISCH, JR.
Captain, Md ANG
Operations Officer

A Certified True Copy

MILLARD F. HAMBLIN, JR.
Millard F. Hamblin, Jr.
Captain, USAF
Acft Acdt Board Recorder

Defendant's Exhibit 5. Local Clearance, S.O.P. No. 18

OFFICE OF THE OPERATIONS OFFICER
104TH FIGHTER INTERCEPTOR SQUADRON
MARYLAND AIR NATIONAL GUARD
BALTIMORE, MARYLAND

25 January 1957

Standing Operating Procedure Number 18

LOCAL CLEARANCES

1. *Purpose & Scope:* This S.O.P. establishes local clearance (AF Form 113) procedures, and applies to all pilots flying aircraft assigned or attached to this organization.

2. All local flights will be monitored by use of the AF Form 113, Local Flight Clearance.

3. The following named officers are authorized to sign as clearing authority on this form:

Commander, 104th Fighter-Interceptor Squadron.
Operations Officer, 104th Fighter-Interceptor Squadron.

Flight Commanders, 104th Fighter-Interceptor Squadron.
Base Operations Officer.
Designated Operations Duty Officer.

By Order of the Commander:

JOSEPH J. MAISCH, JR.
Captain, Md ANG
Operations Officer

Defendant's Exhibit 7, AFR 45-2

*AFR 45-2
1-3

DEPARTMENTS OF THE ARMY AND
THE AIR FORCE
WASHINGTON 25, D. C., *13 April 1949*

ARMY REGULATIONS
No. 130-5
AIR FORCE REGULATION
No. 46-2

NATIONAL GUARD

GENERAL PROVISIONS

	Paragraph
Authority	1
General	2
Responsibilities of Chief, National Guard Bureau	3
National Guard Bureau Regulations	4

1. Authority.—*a.* National Security Act of 1947 (Public Law 253—80th Cong., WD Bul. 11, 1947).

b. Transfer Order 10 (JAAF Bul. 12, 1948), National Military Establishment.

c. JAAFAR 1-11-20. 1948. as changed.

* These regulations supersedes WD General Orders 4, 1961.

2. General.—*a. Army National Guard.*—The National Guard Bureau is charged with administering approved Department of the Army policies other than those relative to training, for the Army National Guard not in the Federal service and with promulgating Department of the Army directives and regulations applicable to the Army National Guard, including those relating to training.

b. Air National Guard.—The National Guard Bureau is charged with administering approved Department of the Air Force policies other than those relative to training, for the Air National Guard not in the Federal service, and with promulgating Department of the Air Force directives and regulations applicable to the Air National Guard, including those relative to training.

c. Joint policies.—The National Guard Bureau is charged with administering approved joint Army and Air Force policies other than those relative to training, when such policies are applicable to both Army National Guard not in the Federal service and the Air National Guard not in the Federal service, and with promulgating joint Army-Air Force directives and regulations applicable to both the Army National Guard and the Air National Guard, including those relating to training.

d. Communication.—The National Guard Bureau is the channel of communication between the Departments of the Army and the Air Force and the several States, Territories, and the District of Columbia on all matters pertaining to the Army National Guard and the Air National Guard.

e. Records.—The National Guard Bureau is the office of record of Department of the Army and Department of the Air Force records of the Army National Guard and Air National Guard not in the Federal service.

3. Responsibilities of Chief, National Guard Bureau.—*a.* The Chief of the National Guard Bureau is responsible to—

(1) The Chief of Staff, United States Army, for all matters pertaining to the Army National Guard.

(2) The Chief of Staff, United States Air Force, for all matters pertaining to the Air National Guard.

(3) Jointly to the Chief of Staff, United States Army, and the Chief of Staff, United States Air Force, for all matters pertaining to both the Army National Guard and the Air National Guard.

b. The Chief of the National Guard Bureau is responsible for—

(1) The proper organization of the National Guard Bureau, which shall include an Army Division and an Air Force Division, together with necessary administrative and executive offices.

(2) Efficient administration of the functions of the National Guard Bureau as outlined in paragraph 2.

(3) Submission to the Chiefs of Staff of such proposals for changes in existing policies, regulations, and laws as appear desirable to him.

(4) The maintenance of mutual understanding and cordial relations between the Departments of the Army and the Air Force, and the Governors, military officials, and National Guard of the several States, Territories, and the District of Columbia.

4. National Guard Bureau Regulations.—*a.* The National Guard Bureau will, from time to time, publish joint National Guard Regulations when such regulations are applicable to both the Army and Air National Guard, or separate National Guard Regulations when such regulations are applicable to the Army National Guard only or to the Air National Guard. National Guard Regulations will govern the Army National Guard and the Air National Guard when not in Federal service in the same manner as Army Regu-

lations or Air Force Regulations govern the Regular components of the service.

b. Joint National Guard Regulations will be issued subject to the approval of the Chief of Staff, United States Army, and the Chief of Staff, United States Air Force. National Guard Regulations pertaining to the Army National Guard only will be issued subject to the approval of the Chief of Staff, United States Army. National Guard Regulations pertaining to the Air National Guard only will be issued subject to the approval of the Chief of Staff, United States Air Force.

c. The Chief, National Guard Bureau is authorized, within the limitations imposed by law, to issue such other publications pertaining to the Army or to the Air National Guard when not in Federal service, as he may deem advisable or necessary, provided that such publications are pursuant to approved policy of the appropriate service or are specifically approved by the Chief of Staff of the appropriate service.

[AG 323 (31 Mar 49)]

BY ORDER OF THE SECRETARIES OF THE ARMY AND THE AIR FORCE:

OMAR N. BRADLEY
Chief of Staff, United States Army

Official:

EDWARD F. WITSELL
Major General
The Adjutant General

HOYT S. VANDENBERG
Chief of Staff, United States Air Force.

Official:

L. L. JUDGE
Colonel, USAF
Air Adjutant General

Distribution:

Army:
C,
For explanation of distribution formula, see SR310 90-1

Air Force:
D. G.
For explanation of distribution formula, see AFR5-4.

Defendant's Exhibit 9, ANGR 50-01

*ANGR 50-01
1-2

DEPARTMENT OF THE AIR FORCE
WASHINGTON 25, D. C., 27 NOVEMBER 1950

AIR NATIONAL GUARD REGULATION
No. 50-01

TRAINING

GENERAL

Paragraph

Training Authority	1
National Guard Bureau Instructions	2
Training Objectives	3
Training Programs and Schedules	4
Responsibility and Duties of Unit Commanders	5
Supervision of Training	6
Aerial Flights and Aviation Accidents	7
Hospitalization and Burial	8
Inter-Service Training of Civilian Component Personnel	9

1. *Training authority.* The requirements to be met and the sources of authority for the training and instruction

* This regulation, together with ANGR's 50-02, 50-03, and 50-04 supersede NGR 45, dated 30 Nov 46, and NGB Cirs 9, 14, and 17, 1949, for the Air National Guard.

of the Air National Guard not in Federal service are set forth in the following:

a. Sections 5, 91, 92, 93, 94, 96, 97, and 99, National Defense Act, as amended, and Sections 201 and 501, Public Law 351, 81st Congress, hereafter referred to as Career Compensation Act of 1949.

b. Air National Guard Regulations.

c. The policies of the Department of the Air Force.

d. The orders, instruction, and training announcements issued by the Chief of Staff, United States Air Force pursuant to authority specifically delegated to him by the Secretary of the Air Force.

e. The orders and detailed instructions promulgated by the Chief, National Guard Bureau to the Air National Guard not in Federal service with the approval of the Chief of Staff, United States Air Force, in amplification of, and to make effective, the policies indicated in c above.

2. *National Guard Bureau Instructions.* The Chief, National Guard Bureau is charged with promulgating to the Air National Guard not in Federal service, from time to time, the necessary orders and instructions to make effective the Department of the Air Force training policies.

a. The training of the Air National Guard will conform to the Department of the Air Force policies and directives as prescribed for the Regular Air Force.

b. It will be conducted by the Air National Guard organizations of the respective States under the supervision of the commanding generals of the appropriate major forces, in accordance with the policies prescribed by the Department of the Air Force. Such supervision will be exercised by:

(1) Preparation of training directives.

(2) Supervision of United States Air Force Instructors.

(3) Authority to conduct inspections.

(4) Conduct of tests.

(5) Furnishing the Department of the Air Force with appropriate reports on state of training and recommendations for necessary remedial actions.

3. *Training Objectives.* Training objectives will be established by State authorities and Air National Guard high commanders in accordance with the principles defined in appropriate training publications and with the policies, directives, and announcements of higher authority. These objectives will conform to the following general requirements:

a. *Individual*:

(1) To develop and qualify personnel in all grades to perform all duties which reasonably may be assigned to them both in peace and for mobilization.

(2) To develop personnel who can be utilized as instructors.

(3) To develop personnel capable of applying the most up-to-date technique in the use of equipment assigned.

(4) To maintain such standards of mental and physical fitness necessary for active field service.

(5) To develop leadership in those individuals who display a willingness to assume responsibility.

b. *Unit*:

(1) To insure that all units will be capable of immediate mobilization and field service with a minimum of time required for field training prior to commitment to actual combat operations.

(2) In addition to its employment as a separate unit, to be capable of integration into any command in which

units of that type reasonably can be expected to be employed.

c. *Additional Objectives for Officers.* In addition to the above, special objectives for Air National Guard officers will be:

(1) To prepare, by progressive selection and training, officers to assume command and staff responsibilities of all echelons up to and including the highest levels.

(2) To prepare those individuals who possess particular aptitude for special or technical assignments in Air National Guard units and to make available the necessary facilities for the development of such individuals' military skills and knowledge.

4. *Training Programs and Schedules.* Training directives will be prepared by United States Air Force. When necessary to implement these directives, the Chief, National Guard Bureau will furnish training programs for all units. Training schedules are prepared by unit commanders only for such training as is to be conducted under their personal direction. Training programs and schedules will be prepared in accordance with the principles defined in appropriate training publications and the training programs of higher authority.

5. *Responsibility and Duties of Unit Commanders.* Training is a function of command, and each commander, is responsible for the military discipline, health, morale, technical and tactical proficiency of his command, including personnel attached thereto by competent authority. While the assistance of the Air Force instructors should be utilized to the fullest extent, their presence and assistance will not relieve organization and unit commanders of personal responsibility for the training of their commands. The commanding officer of a unit is charged with those duties incidental to the training of his unit, not only as a unit but

of the individuals thereof, including the appearance, discipline, and the care and preservation of property. He is also responsible for the proper performance of all duties connected with the administration of his unit, including its pay, clothing, accounts, reports, and returns. In the absence of its commanding officer the command of the unit devolves upon the officer next in rank, eligible to command, who is serving with it unless otherwise specifically directed by higher authority.

6. *Supervision of Training.*

a. *General.* Each Air Force commander is charged with the supervision within his area of all unit training assemblies and field training and of certain classes of supplemental training indicated in ANGR 50-04. The Air Force commanders will make certain that in the supervision of training proper coordination with the State authorities will be made.

b. *Use of Air Force Instructors.* The services of the instructor personnel will be utilized in the supervising execution of all details incidental to making effective the provisions of the Air Force training announcements, except that instructors will not be detailed as Federal inspectors of any unit or organization of the Air National Guard.

c. *Command.* Command is exercised by virtue of office and the special assignment of officers holding military rank who are eligible by law to exercise such command. In time of peace, the right of command within the Air National Guard rests within the Governor of the State and is exercised through the Adjutant General and the individual officers appointed and commissioned in the Air National Guard of the State concerned. Except when ordered to active Federal service by competent authority, the Air National Guard is not legally under the command jurisdiction of officers of the United States Air Force; neither is

the Air National Guard of a State legally subject to orders from an Air National Guard officer from another State.

d. The efficient and effective training of the Air National Guard while under State control requires the highest degree of cooperation and coordination between all echelons of command regardless of State boundaries or other legal barriers, in order to properly train the Air National Guard for its Federal mission. Such cooperation and coordination can be obtained only through a clearly defined channel for control for training purposes. To this end the following training policies are promulgated with the concurrence of the military authorities of the several States, Territories, and the District of Columbia.

(1) On all matters pertaining to operations for training in preparation of Air National Guard units for the discharge of their Federal mission, the Chief of Staff, USAF, through his designated commanders, may exercise training supervision as differentiated from command jurisdiction over Air National Guard units by means of normal military channels.

(2) Commanders of Air National Guard organizations who by virtue of assignment and rank, would be eligible to command when on active duty, ma yexercise training supervision over subordinate units and personnel within their respective organizations in all matters pertaining to training for their Federal mission, regardless of whether or not subordinate units and personnel are assigned to the same State in which the commander is commissioned.

(3) In conformity with the policy enunciated in the foregoing subparagraphs and in order that wing, group, squadrons, and other headquarters organizations and personnel of the Air National Guard may receive training in the utilization of normal tactical channels of communication and operations, and in

order that they may be cognizant of the state of organization and training of units which would be subordinate to them in Federal service even though such units are beyond the confines of the State within which such headquarters are located, the following procedure will be effected:

(a) All correspondence affecting the training and operations, as applied to preparation for readiness for Federal mission, will be forwarded through normal tactical channels of communication, inside or outside the State, with additional copies plainly marked for each intermediate headquarters up to and including wing headquarters.

(b) Information copies of all communications, instructions, orders or directives and copies of reports issued pursuant to this policy will be transmitted through normal administrative channels to the Adjutant General of all States involved and to the Chief, National Guard Bureau.

7. *Aerial Flights and Aviation Accidents.* For definitions see NGR 58 (pending publication of ANGR 173-01.)

Interrogatories and Answers Thereto

1. Did the United States of America on May 20, 1958, own a T-33A-5 jet airplane bearing serial number NC 53-5966?

2. If the answer to the preceding interrogatory is in the affirmative, please answer the following interrogatories;

(b) When and from whom was this airplane purchased by the United States of America?

(c) For what government branch was said airplane purchased by the United States of America?

(d) Was the said airplane assigned or in some manner transferred or turned over to the Maryland Air National Guard, and if so, when and by whom, and by what document or means? Attach a true and correct copy of the document to your answers to these interrogatories.

* * * * *

90. Who paid for the upkeep, maintenance and repair of the said T-33 jet airplane, Serial Number 53-5966 on and within 5 years prior to May 20, 1958? If paid by the State of Maryland, was the state reimbursed by the federal government, by any subsidy or otherwise?

1. Yes, except the serial number of the T-33A-5 jet airplane was NG 53-5966.

(b) It was purchased by the United States of America from the Lockheed Aircraft Corporation in September, 1955.

(c) It was not purchased for any "government branch" of the United States as it was allocated to the Maryland Air National Guard and delivered by the manufacturer directly to the State of Maryland Air National Guard.

(d) Yes; Headquarters, Air Materiel Command directed Lockheed Aircraft Corporation to release said aircraft to the 104th Fighter Bomber Squadron, Air National Guard, Harbor Field, Baltimore, Maryland. This was accomplished on or about September 26, 1955, by TWX, a copy of which is attached hereto and marked "Exhibit 1".

90. From on or about September 26, 1955, the date of delivery of the aircraft by the manufacturer, the United States Government paid for the upkeep, maintenance and repair of the T-33, Serial No. NG 53-5936, until May 20, 1958.

(Filed Sept. 7, 1961)

Memorandum

The Court will find for the plaintiffs on the preliminary issue: "Was Captain McCoy an employee of the United States acting in the scope of his employment, within the purview of the Federal Tort Claims Act, at the time of the occurrence?"

Counsel for plaintiffs will please submit proposed findings of fact and conclusions of law and order.

BURNITA SHELTON MATTHEWS.
Judge

September 7, 1961

Findings of Fact

1. These cases were tried on the preliminary issue:

"Was Captain McCoy an employee of the United States acting in the scope of his employment, within the purview of the Federal Tort Claims Act, at the time of the occurrence?"

2. The actions arise out of a mid-air collison between a Capital Airlines Viscount Airliner and a T-33 Jet plane owned by the United States and allocated to the Maryland Air National Guard. The collision occurred on May 20, 1958 approximately four miles east-northeast of Brunswick over the State of Maryland, at an altitude of about 8,000 feet on a civil airway known as Victor 44 while the Viscount was enroute from Pittsburgh to Baltimore—Friendship Airport. The T-33 jet plane was being operated by Captain Julius R. McCoy on a local area flight out of Martin Airport, Baltimore, Maryland and was operating under visual flight rules.

3. These three cases are brought under the Federal Tort Claims Act against the United States of America and have been consolidated for trial in this court.

4. The airplane operated by Captain McCoy at the time of the accident belonged to the United States and had been allocated to the Maryland Air National Guard. The United States paid the cost of the fuel used by the airplane on all of its flights, provided equipment, paid the salaries of all civilian and military personnel to maintain said equipment, provided new and spare parts for the equipment and made all major repairs needed by said plane and the other planes allocated to the Guard Unit.

5. On the date of the accident Captain Julius R. McCoy was employed as a full time civilian air technician under the provisions of 32 U. S. C., Section 709(a) which provides for civilian caretakers of United States military property.[1] He was also a commissioned officer in the Air National Guard of the State of Maryland.

6. Pursuant to 32 U. S. C., Section 709(a) the Secretary of the Air Force through the National Guard Bureau promulgated Air National Guard Regulation 40-01 dated 20 December 1954, (hereinafter referred to as ANGR 40-01) which designated the jobs in the air technician categories and prescribed the duties and requirements of the job and the prerequisite training for such employment.

7. Under the authority of ANGR 40-01, the National Guard Bureau promulgated Air National Guard Manual 40-01 dated 1 March 1958, (hereinafter referred to as ANGM 40-01) which provides that its provisions will govern all Air National Guard civilian employees. Said manual further provides that the "authority of the National

[1] 32 U. S. C., Section 709(a), Aug. 10, 1956, c. 1041, 70A Stat. 614 provides:

". . . Under such regulations as the Secretary of the Air Force may prescribe, funds allotted by him for the Air National Guard may be spent for the compensation of competent persons to care for material, armament, and equipment of the Air National Guard. A caretaker employed under this subsection may also perform clerical duties incidental to his employment and other duties that do not interfere with the performance of his duties as caretaker."

Guard Bureau to regulate employment and rates of compensation is contained in Department of the Army General Order 96, dated 9 November 1951, subject, 'Delegation of Authority for the Employment and Fixing of Salaries for all caretakers and clerks in the National Guard Bureau.'"

8. Air technicians such as Captain McCoy are full time civilian personnel who are placed at National Guard installations to maintain federal property and records, to the prescribed standard of the Air Force, that cannot be maintained by the normal personnel assigned to the Guard Units. In order to qualify as an air technician (caretaker) under provisions of ANGR 40-01, Captain McCoy attended a nine months' course for Maintenance Officers at the United States Air Force Base and Maintenance School at Chanute Air Force Base, Illinois. He was ordered to active duty and required to attend the school at Chanute by authority of the Secretary of the Air Force. While attending this school, he was paid by the United States Air Force Finance Office at Chanute.

9. As an air technician (caretaker), Captain McCoy held a job entitled Aircraft Maintenance Chief. This job required him to see that 28 aircraft belonging to the United States were properly maintained in accordance with Air Force regulations and to supervise approximately 60 to 65 persons at the Base working on the maintenance and care of these airplanes owned by the United States. All these aircraft were allocated to the Maryland Air National Guard by the National Guard Bureau and were located at Martin Airport near Baltimore, Maryland.

10. Aircraft maintenance procedures are set by the United States Air Force and the responsibilities of Aircraft Maintenance Chiefs are outlined by United States Air Force regulations, manuals, and technical orders. To insure that the unit operated the equipment in accordance with standards prescribed by the United States Air Force, an Air Force Adviser who was on active duty with the

United States Air Force was stationed at Martin Field. If he were dissatisfied with the maintenance situation, he would so report to the Air Force.

11. United States Air Force Inspection Teams made inspections to determine whether the Air Technicians were complying with the requirements of ANGR 40-01. These inspections were made annually to determine whether the technicians were qualified to continue to hold their jobs. If the United States found that a civilian employee of an Air National Guard Unit was not meeting the requirements, it could, in practical effect, work his discharge by stopping his salary.

12. At the time of the occurrence, in addition to his duties as Aircraft Maintenance Chief, Captain McCoy was Acting Maintenance Supervisor for the Base in the absence of Major Mitchell who held this assignment but who was away on a training program. (Prior to May 16, 1958, Captain McCoy had been Maintenance Supervisor but his job status was changed effective that date to Aircraft Maintenance Chief.) At the time of the occurrence, Captain McCoy was the only officer in the aircraft maintenance field at the Base.

13. As Acting Maintenance Supervisor, Captain McCoy had approximately 75 to 80 civilian maintenance personnel under his supervision. The duties of this job included supervision of the maintenance and care of aircraft, vehicles, ground support equipment, all United States property at the Base, and also over-all supervision of the people who maintained the equipment.

14. As an air technician, i.e. in his civilian capacity, Captain McCoy was employed at the Base during the normal work week from 8:00 A.M. to 4:30 P.M., Tuesday through Saturday, except for two Saturdays a month. On those two Saturdays, he would be in his military status as an officer in the Air National Guard and as Squadron Maintenance Officer. The accident occurred on a Tuesday, when

Captain McCoy normally worked in his civilian capacity as an air technician.

15. Captain McCoy's immediate superior in his civilian employee status was Lt. Col. Kilkowski, who was also, in addition to his military status as a member of the Maryland Air National Guard in which he was commanding officer of the Squadron, a civilian employee holding the air technician position of Base Detachment Commander.

16. Captain McCoy applied to Lt. Col. Kilkowski for permission, and received it, to make the flight on May 20, 1958, accompanied by a passenger, Donald Chalmers, who was a member of the Maryland Army National Guard. Captain McCoy informed Lt. Col. Kilkowski that the purpose of the flight was a proficiency flight, and the flight clearance and order issued in connection with the flight indicate that the purpose of the flight was proficiency.

17. In order to maintain his aeronautical rating as a pilot, it was necessary that Captain McCoy perform proficiency flights to comply with the requirements of AFR 60-2 [2] which prescribes certain minimum flying requirements for maintenance of a rating as a flying officer.

18. An aeronautical rating only allows a man to fly the aircraft, if he obtains permission to do so. It does not determine his purpose or the work he is properly doing in flying that aircraft.

19. While the job description of the Aircraft Maintenance Chief's position set forth in Civilian Personnel Manual ANGM 40-01 contains no requirement that the holder of the position be a pilot or that he fly aircraft, the job description for Base Maintenance Supervisor provides that it is "desirable" that the incumbent be a rated pilot on flying status to enable him to "make test flights on assigned aircraft."

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[2] The reference to AFR 60-2 pertains to Air Force Regulation No. 60-2 dated 14 March 1955.

20. It is desirable for the Maintenance Officer to have a flying status for various reasons. For example, when he flies he gets a better understanding of the quality of the maintenance and the condition of the equipment.

21. Captain McCoy's status as Acting Maintenance Supervisor and Aircraft Maintenance Chief for the Base made it desirable for him to make frequent aerial flights. This was an important facet of his work in maintenance. As an air technician Aircraft Maintenance Officer, one reason for this flight or any flight that he engaged in was to insure the proper maintenance of the equipment over which he had general supervision. While flying, he could see and check the cleanliness of his runways, parking and service areas (ramps), see the condition of the airport, check the efficiency of the tower personnel and the way his maintenance people reacted. In short, whenever he flew he could get a better appreciation of the way the people under his supervision were doing their job. It was also part of Captain McCoy's duties in his air technician civilian job to fly functional check flights. Therefore, since he had to maintain proficiency as a pilot in order to be qualified and competent to perform these flights, even flying for proficiency related to Captain McCoy's civilian job.

22. During the course of the flight Captain McCoy checked the efficiency of the equipment in order to determine if it were working properly.

23. The particular flight at the time of the accident was part of Captain McCoy's function to maintain proficiency and maintain the equipment.

24. Captain McCoy in his full time air technician (caretaker) job was paid by check drawn on the Treasury of the United States. His annual salary was $7,500 per annum. He was also paid approximately $2,000 per annum by the Treasurer of the United States for his part-time military duties.

25. While it was necessary for Captain McCoy to have a military pilot's rating in order to fly a United States military plane, his work in flying such plane could involve performance in a dual (military and civilian) capacity. However, he could only occupy one *pay* status at a time. He could occupy his pay status as a civilian caretaker in maintenance work or he could occupy his pay status as an air National Guardsman in a military capacity.

26. In addition to the civil or military pay statuses, he could receive or earn extra flight pay for flying in any month. In May 1958, at the time of the accident, Captain McCoy had accumulated more than the number of hours for which he could earn flight pay for the period in question. His flight on the occasion in question therefore was not to earn flight pay.

27. On the morning in question, Tuesday, May 20, 1958, Captain McCoy reported to the Base and commenced work, at the usual starting time, on his full time civilian caretaker job as an air technician in the position of Aircraft Maintenance Chief. That day he was also the Acting Maintenance Supervisor in Major Mitchell's absence. Before the flight he performed certain administrative duties required every day to establish the order of business for the day; that included the determination of which aircraft would be maintained and gotten ready for flight or repair, if necessary, and the work assignments of various individuals. At the time of the occurrence, he was recorded as present at the Base in his civilian capacity. He was carried on the roster in his air technician pay status and was ultimately paid by the United States Treasurer in this capacity.

28. Following the accident, because of his injuries, Captain McCoy was unable to continue with his work and his status was changed on the roll at the Base on that same day from "active duty" as civilian air technician to an "inactive" or "sick" status as civilian air technician.

29. The passenger who rode with Captain McCoy, Donald A. Chalmers, was required to sign a release prior to the flight releasing the United States and the State of Maryland from any liability on account of Chalmers' injury or death due to the flight.

30. Following the accident, application was made by Captain McCoy for benefits (medical care and treatment of the injuries suffered) under the Federal Employees' Compensation Act.[3]

31. Captain McCoy was entitled to medical care and treatment under the Federal Employees' Compensation Act only if he were injured in his capacity as a federal employee (air technician working in civilian status as maintenance officer of United States Government property) while in the performance of his duty. He was not entitled to any benefits under that Act if he were injured while working in his military capacity in the Air National Guard, since different benefits were provided by another statute (32 U. S. C. 319) for injuries occurring to a guardsman while acting in a military capacity.

32. Lt. Col. Kilkowski, the Base Detachment Commander, approved the application of Captain McCoy for medical and hospital benefits under the Federal Employees' Compensation Act.

33. Thereafter, Colonel Ebaugh, United States Property and Fiscal Officer for the State of Maryland, on active duty in the service of the United States, employed by the National Guard Bureau, a federal agency, working directly under General Wilson, Deputy Chief of the Bureau, approved the claim, stating that Captain McCoy was injured in the course of his employment as a "civil employee of the United States and *not* as a member of the Maryland National Guard" (Plaintiffs' Ex. 5G).

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[3] 5 U. S. C. 751 et seq.

34. The United States Department of Labor, through Stuart Rothman, its solicitor, by Mr. Wright, Chief of its Subrogation Branch, and by a claims supervisor for the Bureau of Employees' Compensation, United States Department of Labor, John Stasko, and by John M. Diggins, a claims examiner of the same department, in the usual course of business:

(a) Approved the claim and authorized the payment of benefits under the Federal Employees' Compensation Act for Captain McCoy as a federal civilian employee injured in the performance of his duties;

(b) Paid such benefits;

(c) Prepared and had Captain McCoy execute a written assignment to the United States of subrogation rights to recover from Captain Airlines and against any other parties than the United States the amount of benefits paid for Captain McCoy by the United States under the Federal Employees' Compensation Act. This assignment stated that Captain McCoy was injured "while employed as Aircraft Maintenance Chief (pilot) by the Department of the Air Force". (Pls. Ex. 5E).

35. In flying the airplane at the time of the occurrence, Captain McCoy was at least in part carrying out his civilian work as Aircraft Maintenance Chief and Acting Maintenance Supervisor of the Base, and therefore, was an employee of the United States acting within the scope of his employment..

BURNITA SHELTON MATTHEWS,
Judge.

October 27, 1961

Conclusions of Law

1. A person employed as an air technician (caretaker) in a non-activated National Guard Unit is an employee of the United States within the meaning of the Federal Tort Claims Act.

2. Captain Julius R. McCoy was at the time of the accident an employee of the United States acting in the scope of his employment,[1] within the purview of the Federal Tort Claims Act.

3. Judgment on the preliminary issue will be entered in favor of the plaintiffs.

BURNITA SHELTIN MATTHEWS,
Judge.

October 27, 1961

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Order

These causes coming on for hearing at this term of court, and upon consideration of the depositions, exhibits and testimony, it is by the court this 27th day of October, 1961,

ORDERED, that judgment be and is hereby entered in favor of the plaintiffs on the issue: "Was Captain McCoy an employee of the United States acting in the scope of his employment, within the purview of the Federal Tort Claims Act, at the time of the occurrence?"

BURNITA SHELTIN MATTHEWS,
Judge.

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[1] *Restatement of the Law of Agency*, Agency 2nd, Sections 226, 228, 229, 235 and 236; *Great Atlantic and Pacific Tea Co.* v. *Nappenberger*, 171 Md. 378, 390; 189 A. 434, 440.

[fol. 689]

PLAINTIFF'S EXHIBIT No. 5

RELEASE

Martin Airport
(Place)

20 May '58
(Date)

KNOW ALL MEN BY THESE PRESENTS: WHEREAS, I, DONALD A. CHALMERS
(Full Name)

am this date to take a flight or flights as a passenger in certain Air National Guard aircraft of the Maryland Air National Guard; and whereas, I am doing so entirely upon my own initiative, risk, and responsibility; now, therefore, in consideration of the permission extended to me by the United States and the State of Maryland through its officers and agents to take paid flight or flights, I do hereby for myself, my heirs, executors, and administrators, remise, release, and forever discharge the Government of the United States and the State of Maryland, and all its officers and agents, acting officially or otherwise, from any and all claims, demands, notions, or causes of action, on account of my death or on account of any injury to me which may occur by reason of the said flight or flights.

The term "flight or flights" as used herein is understood and agreed to include the preparation for, continuation, and flight operations incident thereto. It is further understood and agreed that this release, among other things, extends to and includes negligence, faulty pilotage, and structural failure of the aircraft thereof.

[fol. 690] The execution hereof does not operate to waive any statutory right conferred by act of Congress.

Signature Illegible
(Witness)

Signature Illegible
(Witness)

Signature Illegible
(Witness)

DONALD A. CHALMERS
(Signature).

MRS. A. E. CHALMERS
(Name of person to be notified in case of emergency)
Va. 5-2622

8427 Pleasant Plains Rd.
Balto., 4
(Address of person to be notified in case of emergency)

EXCERPT FROM INTERROGATORIES

Q. 128. What was the training area of the Air National Guard of the State of Maryland on and prior to May 20, 1958?

A. 128. Upon information and belief, the training area of the Maryland Air National Guard, on and prior to May 20, 1958, was in the Continental United States.

[fol. 691]

IN UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

C. A. No. 17503

STATE OF MARYLAND for the use of NADINE Y. LEVIN, individually, and as next friend, mother and guardian of and for the use of JOY ELLEN LEVIN, an infant under the age of 14 years; and MELLON NATIONAL BANK AND TRUST COMPANY as Executor of the Estate of Jack Levin, deceased,

vs.

UNITED STATES OF AMERICA.

OPINION—Entered December 20, 1961

WALLACE S. GOURLEY, Chief Judge:

In this non-jury proceeding under the Federal Tort Claims Act based upon two death actions arising from a mid-air collision between a Capital commercial airliner and a T-33 jet plane owned by the United States of America, the court is confronted with three issues requiring determination:

1. Was Captain Julius R. McCoy, pilot of the T-33 jet plane, an employee of the United States acting in the scope of his employment within the purview of the Federal Tort Claims Act at the time of the accident?

2. Was Captain Julius R. McCoy guilty of negligence which was a substantial factor in bringing about the accident?

[fol. 692] 3. What damages were sustained?

Upon evaluation of all the testimony, oral and documentary, and the inferences deducible therefrom the court enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

PART I—AGENCY OF CAPTAIN MCCOY IN OPERATION OF THE JET T-33 AIRCRAFT

1. The actions arise out of a mid-air collision between a Capital Airlines Viscount Commercial Air Transport aircraft and a T-33 Jet aircraft owned by the United States and allocated to the Maryland Air National Guard. The collision occurred on May 20, 1958, approximately four miles east-northeast of Brunswick over the State of Maryland, at an altitude of about 8,000 feet on a civil airway known as Victor 44 while the Viscount was enroute from Pittsburgh to Baltimore—Friendship Airport. The T-33 jet aircraft was being operated by Captain Julius R. McCoy on a local area flight originating out of Martin Airport, Baltimore, Maryland, and was operating under visual flight rules.

2. These two cases are brought under the Federal Tort Claims Act against the United States of America and have been consolidated for trial in this court.

3. The airplane operated by Captain McCoy at the time of the accident belonged to the United States and had been allocated to the Maryland Air National Guard. The United States paid the cost of the fuel used by the airplane on all of its flights, provided equipment, paid the salaries of all civilian and military personnel to maintain said equipment, provided new and spare parts for the equipment and made all major repairs needed by said plane and the other planes allocated to the Guard Unit.

4. On the date of the accident Captain Julius R. McCoy was employed as a full time civilian air technician under [fol. 693] the provisions of 32 U.S.C.A. § 709(a) which provides for civilian caretakers of United States Military Property.[1] He was also a commissioned officer in the Air National Guard of the State of Maryland.

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[1] 32 U.S.C.A. Section 709(a) provides:

"... Under such regulations as the Secretary of the Air Force may prescribe, funds allotted by him for the Air National

5. Pursuant to 32 U.S.C.A. § 709(a) and under the direction of the Secretary of the Air Force there was promulgated a "Civilian Personnel Manual," dated December 20, 1954, (hereinafter referred to as ANGM 40-01) which listed the jobs in the air technician categories and prescribed the duties and requirements of the jobs and the prerequisite training for such employment. This also contained a job description of aircraft maintenance chief and aircraft maintenance supervisor.

6. Under the authority of ANGM 40-01, the National Guard Bureau promulgated Air National Guard Manual 40-01 dated 1 March 1958, (hereinafter referred to as ANGM 40-01) which provides that its provisions will govern all Air National Guard civilian employees. Said manual further provides that the "authority of the National Guard Bureau to regulate employment and rates of compensation is contained in Department of the Army General Order 96, dated 9 November 1951, subject, 'Delegation of Authority for the Employment and Fixing of Salaries for all Caretakers and Clerks in the National Guard Bureau.'"

7. Air technicians such as Captain McCoy are full time civilian personnel who are placed at National Guard installations to maintain federal property and records, to the prescribed standard of the United States Air Force, that cannot be maintained by the normal personnel assigned to the Guard Units. In order to qualify as an air [fol. 694] technician (caretaker) under provisions of ANGM 40-01, Captain McCoy attended a nine months' course for Maintenance Officers at the United States Air Force Base and Maintenance School at Chanute Air Force Base, Illinois. He was ordered to active duty and required to attend the school at Chanute by authority of the Secretary of the Air Force. While attending this school, he was

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Guard may be spent for the compensation of competent persons to care for material, armament, and equipment of the Air National Guard. A caretaker employed under this subsection may also perform clerical duties incidental to his employment and other duties that do not interfere with the performance of his duties as caretaker."

paid by the United States Air Force Finance Office at Chanute.

8. As an air technician (caretaker), Captain McCoy held a job entitled Aircraft Maintenance Chief. This job required him to see that 28 aircraft belonging to the United States were properly maintained in accordance with Air Force regulations and to supervise approximately 60 to 65 persons at the Base working on the maintenance and care of these airplanes owned by the United States.

9. Aircraft maintenance procedures are set by the United States Air Force and the responsibilities of Aircraft Maintenance Chiefs are outlined by United States Air Force regulations, manuals, and technical orders. To insure that the unit operated the equipment in accordance with standards prescribed by the United States Air Force, an Air Force Adviser who was on active duty with the United States Air Force was stationed at Martin Field. If he were dissatisfied with the maintenance situation, he would so report to the Air Force.

10. United States Air Force Inspection Teams made inspections to determine whether the Air Technicians were complying with the requirements of ANGM 40-01. These inspections were made annually to determine whether the technicians were qualified to continue to hold their jobs. If the United States found that a civilian employee of an Air National Guard Unit was not meeting the requirements, it could, in practical effect, work his discharge by stopping his salary.

11. At the time of the occurrence, in addition to his duties as Aircraft Maintenance Chief, Captain McCoy was Act- [fol. 695] ing Maintenance Supervisor for the Base in the absence of Major Mitchell who held this assignment but who was away on a training program. (Prior to May 16, 1958, Captain McCoy had been Maintenance Supervisor but his job status was changed effective that date to Aircraft Maintenance Chief.) At the time of the occurrence, Captain McCoy was the only officer in the aircraft maintenance field at the Base.

12. As Acting Maintenance Supervisor, Captain McCoy had approximately 60 to 65 civilian maintenance personnel under his supervision. The duties of this job included supervision of the maintenance and care of aircraft, vehicles, ground support equipment, all United States property at the Base, and also over-all supervision of the people who maintained the equipment.

13. As an air technician, i.e., in his civilian capacity, Captain McCoy was employed at the Base during the normal work week from 8:00 A.M. to 4:30 P.M., Tuesday through Saturday, except for two Saturdays a month. On those two Saturdays, he would be in his military status as an officer in the Air National Guard and as Squadron Maintenance Officer. The accident occurred on a Tuesday, when Captain McCoy worked in his civilian capacity as an air technician in accordance with the usual practice and procedure at the Base.

14. Captain McCoy's immediate superior in his civilian employee status was Lt. Col. Kilkowski, who was also, in addition to his military status as a member of the Maryland Air National Guard in which he was commanding officer of the Squadron, a civilian employee holding the air technician position of Base Detachment Commander.

15. Captain McCoy applied to Lt. Col. Kilkowski for permission, and received it, to make the flight on May 20, 1958, accompanied by a passenger, Donald Chalmers, who was a member of the Maryland Army National Guard. Captain McCoy informed Lt. Col. Kilkowski that the purpose of the flight was a proficiency flight, and the flight [fol. 696] clearance and order issued in connection with the flight indicate that the purpose of the flight was proficiency.

16. In order to maintain his aeronautical rating as a pilot, it was necessary that Captain McCoy perform proficiency flights to comply with the requirements of AFR 60-2[2] which prescribes certain minimum flying requirements for maintenance of a rating as a flying officer.

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[2] The reference to AFR 60-2 pertains to Air Force Regulation No. 60-2 dated 14 March 1955.

17. An aeronautical rating only allows a man to fly the aircraft, if he obtains permission to do so. It does not determine his purpose or the work he is properly doing in flying that aircraft.

18. While the job description of the Aircraft Maintenance Chief's position set forth in Civilian Personnel Manual ANGM 40-01 contains no requirement that the holder of the position be a pilot or that he fly aircraft, the job description for Base Maintenance Supervisor provides that it is "desirable" that the incumbent be a rated pilot on flying status to enable him to "make test flights on assigned aircraft."

19. It is desirable for the Maintenance Officer to have a flying status for various reasons. For example, when he flies the aircraft, he observes under operating conditions the quality of the maintenance being performed thereon as well as the condition of the equipment, all of which is necessary to and part of the efficient performance of his job as air technician and caretaker of United States property.

20. Captain McCoy's status as Acting Maintenance Supervisor and Aircraft Maintenance Chief for the Base made it desirable for him to make frequent aerial flights. This was an important part of his work in maintenance of the aircraft. As an air technician Aircraft Maintenance Officer, one reason for this flight or any flight that he engaged in was to insure the proper maintenance of the [fol. 697] equipment over which he had general supervision. While flying, he could also see and check the cleanliness of his runways, parking and service areas (ramps), see the condition of the airport, check the efficiency of the tower personnel and the way his maintenance people reacted. In short, whenever he flew he could get a better appreciation of the way the maintenance (caretaker) people under his supervision were doing their job. It was also part of Captain McCoy's duties in his air technician civilian job to fly functional check flights. Therefore, since he had to maintain proficiency as a pilot in order to be qualified and competent to perform these flights, even flying for proficiency related to Captain McCoy's civilian job.

21. During the course of the flight Captain McCoy checked the efficiency of the T-33 jet and its equipment in order to determine if it were working properly and if the maintenance thereon had been properly performed.

22. The particular flight at the time of the accident was part of Captain McCoy's function to maintain proficiency and maintain the equipment of the United States as a civilian air technician (caretaker).

23. Captain McCoy in his full time air technician (caretaker) job was paid by check drawn on the Treasury of the United States. His annual salary was $7,500 per annum. He was also paid approximately $2,000 per annum by the Treasurer of the United States for his part-time military duties.

24. While it was necessary for Captain McCoy to have a military pilot's rating in order to fly a United States military plane, his work in flying such plane could involve performance in a dual (military and civilian) capacity. However, he could only occupy one *pay* status at a time. He could occupy his pay status as a civilian caretaker in maintenance work or he could occupy his pay status as an air National Guardsman in a military capacity.

[fol. 698] 25. In addition to the civil or military pay status he could receive or earn extra flight pay for flying in any month. In May 1958, at the time of the accident, Captain McCoy had accumulated more than the number of hours for which he could earn flight pay for the period in question. His flight on the occasion in question therefore was not to earn flight pay.

26. On the morning in question, Tuesday, May 20, 1958, Captain McCoy reported to the Base and commenced work, at the usual starting time, on his full time civilian caretaker job as an air technician in the position of Aircraft Maintenance Chief. That day he was also the Acting Maintenance Supervisor in Major Mitchell's absence. Before the flight he performed certain administrative duties required every day to establish the order of business for the day; that included the determination of which aircraft

would be maintained and gotten ready for flight or repair, if necessary, and the work assignments of various individuals. At the time of the occurrence, he was recorded as present at the Base in his civilian capacity. He was carried on the roster in his air technician caretaker pay status and was ultimately paid by the United States Treasurer in this capacity.

27. Following the accident, because of his injuries, Captain McCoy was unable to continue with his work and his status was changed on the roll at the Base on that same day from "active duty" as civilian air technician to an "inactive" or "sick" status as civilian air technician.

28. The passenger who rode with Captain McCoy, Donald A. Chalmers, was required to sign a release prior to the flight releasing the United States and the State of Maryland from any liability on account of Chalmers' injury or death due to the flight.

29. Following the accident, application was made by Captain McCoy for benefits (medical care and treatment of [fol. 699] the injuries suffered) under the Federal Employees' Compensation Act.[3]

30. Captain McCoy was entitled to medical care and treatment under the Federal Employees' Compensation Act only if he were injured in his capacity as a federal employee (air technician working in civilian status as maintenance officer of United States Government property) while in the performance of his duty. He was not entitled to any benefits under that Act if he were injured while working in his military capacity in the Air National Guard, since different benefits were provided by another statute (32 U.S.C.A. 319) for injuries occurring to a guardsman while acting in a military capacity.

31. Lt. Col. Kilkowski, the Base Detachment Commander, (Air Technician) approved the application of Captain McCoy for medical and hospital benefits under the aforesaid Federal Employees' Compensation Act.

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[3] 5 U.S.C.A. § 751, *et seq.*

32. Thereafter, Colonel Ebaugh, United States Property and Fiscal Officer for the State of Maryland, on active duty in the service of the United States, employed by the National Guard Bureau, a federal agency, working directly under General Wilson, Deputy Chief of the Bureau, approved the claim, stating that Captain McCoy was injured in the course of his employment as a "civil employee of the United States and *not* as a member of the Maryland National Guard."

33. The United States Department of Labor, through Stuart Rothman, its solicitor by one Mr. Wright, Chief of its Subrogation Branch, and by a claims supervisor for the Bureau of Employees' Compensation, United States Department of Labor, John Stasko, and by John M. Diggins, a claims examiner of the same department, in the usual course of business:

(a) Approved the claim and authorized the payment of benefits under the Federal Employees' Compensa-
[fol. 700] tion Act for Captain McCoy as a federal civilian employee injured in the performance of his duties;

(b) Paid such benefits;

(c) Prepared and had Captain McCoy execute a written assignment to the United States of subrogation rights to recover from Capital Airlines and against any other parties than the United States the amount of benefits paid for Captain McCoy by the United States under the Federal Employees' Compensation Act. This assignment stated that Captain McCoy was injured "while employed as Aircraft Maintenance Chief (pilot) by the Department of the Air Force."

34. In operating the airplane at the time of the occurrence, Captain McCoy was carrying out his civilian work as Aircraft Maintenance Chief and Acting Maintenance Supervisor of the Base, and therefore, was a civil employee of the United States acting within the scope of his employment.

PART II—NEGLIGENCE OF CAPTAIN MCCOY WHILE ACTING AS AN AGENT OF THE UNITED STATES OF AMERICA.

35. The collision occurred in clear and unobstructed skies on May 20, 1958, at about 11:27 A.M., Eastern Daylight Time, while the Viscount was enroute under Instrument Flight Rules from Pittsburgh to Baltimore—Friendship Airport. The T-33 jet plane was being operated by Captain Julius B. McCoy, an employee of the United States, in the course and scope of his employment, on a local area flight out of Martin Airport, Baltimore, Maryland, and was operating under Visual Flight Rules. Both aircraft were operating subject to the Civil Air Regulations of the United States.

36. Prior to the accident the Capital Airlines plane was observed by a number of witnesses who testified that prior to and including the moment of the collision with the T-33 Jet the Capital Airlines' Viscount was proceeding straight [fol. 701] ahead on an easterly course in level flight and did not change its course up or down or to the left or to the right.

37. The same witnesses also testified that the T-33 Jet operated by Captain Julius R. McCoy was also traveling in an easterly direction and at a faster rate of speed than the Capital plane; that it approached and overtook the Capital plane after being observed on an approximately parallel course which was a distance of approximately one mile or more north of the Capital Viscount and that the T-33 Jet then made a turn toward the right as it was approaching the Capital plane, approached it obliquely from the left and initially struck the Capital plane in its forward nosesection; that the T-33 jet struck the Viscount under conditions of clear visibility.

38. The T-33 Jet initially struck the Capital plane with its right tip-tank, a fuel tank located and attached to the tip and outer end of the right wing.

39. Following the initial impact the Jet aircraft then rolled over the top of the Capital Viscount and exploded in the air.

40. Following the impact, the Capital Viscount continued ahead for a short distance, and then commenced to slowly spiral down to the ground in a relatively level altitude and intact condition with no apparent inflight damage to its cabin section. The Viscount struck the ground after the passage of an appreciable interval of time from the moment of collision. Upon striking the ground, the Viscount broke up and was destroyed and all on board were killed.

41. The pilot of the T-33 Jet was ejected from his aircraft during the course of the accident, and opened his parachute. He was the only survivor of the accident. The single passenger in the T-33 jet died in the accident.

42. The pilot of the T-33 Jet, Captain Julius R. McCoy in the operation of his airplane, and in colliding with the Capital Viscount, was negligent and careless in the opera-
[fol. 702] tion of his plane, and in addition, violated each of the following Civil Air Regulations:

#60.10. *Application.* Aircraft shall be operated at all times in compliance with the following general flight rules and also in compliance with either the visual flight rules or the instrument flight rules whichever are applicable.

#60.12. *Careless or reckless operation.* No person shall operate an aircraft in a careless or reckless manner so as to endanger the life or property of others.

(c) Lack of vigilance by the pilot to observe and avoid other air traffic. In this respect, the pilot must clear his position prior to starting any maneuver, either on the ground or in flight.

(d) Passing other aircraft too closely.

#60.15. *Proximity of aircraft.* No person shall operate an aircraft in such proximity to other aircraft as to create a collision hazard.

43. The pilot of the T-33 jet failed to maintain adequate vigilance although he had clear visibility and sufficient range of vision. He also negligently failed to avoid the Viscount and to take appropriate evasive action.

44. The proximate cause of the accident was the negligence and wrongful conduct of the employee of the defendant, the United States of America, Captain Julius R. McCoy.

Part III. Damages Sustained

A. The Action for the Death of JACK LEVIN

45. Jack Levin was employed as Vice President in charge of Sales and Merchandising by Swift Homes, Inc., on and prior to May 20, 1958.

46. On and prior to May 20, 1958, he was the husband of Nadine Y. Levin and father of Joy Ellen Levin, child of the marriage.

47. That Jack Levin was born on January 4, 1918, and died in the accident on May 20, 1958.

[fol. 703] 48. That he left him surviving as a dependent next of kin his aforesaid widow and child.

49. That Nadine Y. Levin, the widow, was born May 1, 1924; that Joy Ellen Levin, the daughter, was born September 28, 1955.

50. That the said widow and child of Jack Levin were wholly dependent on him for maintenance and support and each of them has suffered pecuniary loss by reason of his death; that in addition his child has suffered the loss of guidance, comfort, education, companionship and the widow has suffered the loss of comfort, companionship, care and affection, and loss of consortium.

51. That at the time of the death of Jack Levin, his expectancy of life based upon the United States Abridged Life Tables was 31.6 years; the expectancy of life of his widow according to the said table on said date was 41.4 years, that the stipulated joint expectancy of life of Jack Levin and Nadine Y. Levin, his widow, on May 20, 1958 was 29 years, that the years from her age at the time of death of Jack Levin until Joy Ellen Levin would become twenty-one years of age was 18⅓ years; that Jack Levin and his wife and child were in excellent health at the time of his death.

52. While employed by Swift Homes, Inc., Jack Levin's annual earnings were as follows: 1954—$53,737.16; 1955—$56,409.28; 1956—$60,587.26; 1957—$58,235.05; for the first 4⅔ months of 1958 to the date of death—$24,070.20, that had he continued in the employ of said Company there were reasonable prospects for substantial increases in his earnings; and Jack Levin having realized increased annual benefits from the profit sharing plan up to the date of his death and had he not been killed in this accident he would have realized additional substantial benefits from this plan as well as other side benefits by the way of health insurance, premium for life insurance from which we may establish an approximate average earnings of $60,000 a year.

[fol. 704] 53. That at the time of death and for several years prior thereto, approximately ⅔'s of the earnings of the said Jack Levin was being used for the support, care, maintenance of his wife and child, that approximately ⅓ of his said earnings was being used for the maintenance and support of Nadine Y. Levin, his wife, and ⅓ of his said earnings was being used for the support, care, education and maintenance of his minor child, Joy Ellen Levin; that after payment of taxes on the aforementioned earnings, and after payment by decedent for support of his mother the approximate sum of $4,000 per year, there remained approximately $36,000 per year which, according to the foregoing percentages, was expended entirely for the support of Jack Levin and his family of which ⅔'s was used for their support, care and maintenance; that approximately ⅓ or $12,000 out of his said earnings was being used for the maintenance and support of Nadine Y. Levin, his wife, and approximately ⅓ or $12,000 of his said earnings was being used for the support, care, maintenance and education of Joy Ellen Levin, his minor child; and these contributions would have continued until the minor child would attain the age of twenty-one, at which time a portion of the earnings which had been used for such child would be added to the share of earnings used by the said widow, Nadine Y. Levin; thereafter the contributions for the care, maintenance and support of the wife would have continued on the basis of ½ of the net earnings after taxes

or $18,000 per year for the balance of the joint life expectancy, or an additional eleven years.

54. That by reason of the death of Jack Levin, Nadine Y. Levin, his widow, suffered and will suffer pecuniary loss and damages, including loss of society, care, comfort and companionship, and the present cash value of said pecuniary loss and damages reduced to present worth is $245,000.

55. That by reason of the death of Jack Levin, his child, Joy Ellen Levin, suffered and will suffer pecuniary loss and damages to twenty-one years of age including guidance, [fol. 705] care, loss of society, care and comfort, and the present cash value of said pecuniary loss and damages suffered by said child as a result of the death of her father reduced to present worth is $100,000.

56. That by reason of the premises, the said Jack Levin experienced conscious pain and suffering from the moment of collision impact until the time of his death after the Viscount aircraft struck the ground; that by reason thereof, Mellon National Bank and Trust Company, the Executor of the Estate of Jack Levin, shall recover from the defendant as follows:

(a) For the conscious pain and suffering of Jack Levin the sum of $5,000.

(b) For stipulated funeral expenses the sum of $1,000.

B. The Action for the Death of RUTH M. JOHNS

57. That Ruth M. Johns on and prior to May 20, 1958, was the wife of Sydney L. Johns.

58. That Ruth M. Johns and Sydney L. Johns were married September 16, 1933, and resided together continually as husband and wife until the date of death of Ruth M. Johns.

59. That Ruth M. Johns was born on March 24, 1911, and died in the accident on May 20, 1958, and left her surviving her husband, Sydney L. Johns, that there were no children of said marriage.

60. That Sydney L. Johns, the widower, was born January 4, 1908, and was duly licensed to engage in the practice of medicine in the State of Pennsylvania and practiced in said state from on or about September 30, 1931. Ruth M. Johns and Sydney L. Johns resided together in their own private house in the City of Pittsburgh and that a section of said house was utilized by Sydney L. Johns as an office for the practice of his profession.

[fol. 706] 61. That since 1941 and until the date of her death, Ruth M. Johns was employed by Sydney L. Johns and rendered services to him as an office manager and medical assistant in connection with his practice of medicine and that her duties included answering telephones, taking messages, receptionist, making appointments, keeping records, bookkeeping, billing, assisting in the handling, soothing and calming of patients, care and maintenance of the office and equipment, being present while women patients were being treated and generally useful in the duties of an office manager medical assistant.

62. That Dr. Sydney L. Johns maintained office hours at least five days a week and that Ruth M. Johns rendered services as an office manager and medical assistant at least forty hours a week in addition to her services as a housewife and marriage partner of Sydney L. Johns.

63. That the fair and reasonable value of the services rendered by Ruth M. Johns to Sydney L. Johns as of the time of her death was $320.00 per month.

64. That in addition to the aforesaid services there existed a relationship of mutual love, affection and devotion between Ruth and Sydney Johns, that they were also dependent upon each other for guidance and companionship and that Ruth Johns also faithfully performed the duties of a housewife in maintaining and keeping the home of Sydney Johns.

65. That Sydney L. Johns by reason of the death of Ruth M. Johns also suffered loss of consortium, care, affection, love and companionship.

66. That by reason of the death of Ruth M. Johns, Sydney L. Johns suffered the loss of her services as his office manager and medical assistant; that his gross income for several years prior to her death was approximately $9,000 annually and dropped in the year following her death to $3,312.

[fol. 707] 67. That at the time of death of Ruth M. Johns, her expectancy of life according to the United States Life Tables was 29.36 years; the life expectancy of her widower, Sydney L. Johns, according to the said tables on said date was 22.83 years; that the stipulated joint expectancy of life of Ruth M. Johns and Sydney L. Johns, her widower, on May 20, 1958, was 20 years.

68. That except for a minor impairment of motion of her neck, Ruth M. Johns was in excellent health at the time of her death; that there was no evidence that this impairment of motion limited in any way her life expectancy; that the health of Dr. Sydney L. Johns at the time of the death of Ruth M. Johns was excellent; that the mother of Ruth M. Johns is still alive at the age of eighty-three and her father is still alive at the age of eighty-seven and that her grandmother died at the age of ninety-one; that no evidence in diminution of the aforesaid normal life expectancy of Ruth M. Johns and Sydney L. Johns was offered by the defendant or received by the court.

69. That by reason of the death of Ruth M. Johns, Sydney L. Johns, her widower, suffered and will suffer pecuniary loss and damages including loss of her society, comfort, care, love and guidance and the present cash value of said pecuniary loss and damages reduced to present worth is $70,000.

70. That by reason of the premises, the said Ruth M. Johns experienced conscious pain and suffering from the moment of collision impact until the time of her death after the Viscount aircraft struck the ground; that by reason thereof, Kennedy Smith, Executor of the Estate of Ruth M. Johns, shall recover from the defendant as follows:

(a) For the conscious pain and suffering of Ruth M. Johns the sum of $5,000.

(b) For stipulated funeral expenses the sum of $1,000.

[fol. 708] Conclusions of Law

1. A person employed as an air technician (caretaker) in a non-activated National Guard unit is an employee of the United States within the meaning of the Federal Tort Claims Act.

2. Captain Julius R. McCoy at the time of the accident was an employee of the United States acting within the scope of his employment within the purview of the Federal Tort Claims Act.

3. The deaths and injuries suffered by the decedents and the plaintiffs herein and the damages resulting therefrom were caused by the negligence of the United States by its employee, Captain Julius R. McCoy, acting within the scope of his employment.

An appropriate Order is entered.

Order

And Now, this 20th day of December, 1961, It Is Ordered and Decreed as Follows:

Judgment will be and hereby is entered in favor of Nadine Y. Levin and against the United States of America in the amount of Two Hundred Forty-five Thousand Dollars ($245,000).

Judgment will be and hereby is entered in favor of Joy Ellen Levin and against the United States of America in the amount of One Hundred Thousand Dollars ($100,000).

Judgment will be and hereby is entered in favor of Mellon National Bank and Trust Company, Executor of the Estate of Jack Levin, deceased, and against the United States of America in the amount of Five Thousand Dollars ($5,000) for conscious pain and suffering, and in the amount of One Thousand Dollars ($1,000) as stipulated funeral expenses, or a total of Six Thousand Dollars ($6,000).

Judgment will be and hereby is entered in favor of Sydney L. Johns and against the United States of America in the amount of Seventy Thousand Dollars ($70,000).

Wallace S. Gourley, CDJ, Chief Judge.

[fol. 709]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 14,041 and 14,042

STATE OF MARYLAND for the use of
NADINE Y. LEVIN, et al., *Plaintiff-Appellees,*

v.

UNITED STATES OF AMERICA, *Defendant-Appellant,*

STATE OF MARYLAND for the use of
SYDNEY L. JOHNS, et al., *Plaintiff-Appellees,*

v.

UNITED STATES OF AMERICA, *Defendant-Appellant.*

Appeal from Judgments of the United States District Court for the Western District of Pennsylvania

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Argued May 21, 1963

Before: STALEY, HASTIE and SMITH, *Circuit Judges.*

OPINION OF THE COURT—Filed April 1, 1964

By SMITH, *Circuit Judge.*

These appeals are from judgments in favor of the use plaintiffs in actions for wrongful death brought under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 and [fol. 710] 2674. The deaths resulted from a mid-air collision between a commercial airliner owned by Capital Airlines, in which the decedents were passengers, and a jet

trainer plane owned by the defendant and allocated to the Maryland Air National Guard pursuant to § 702(a), 32 U.S.C., and the regulations promulgated thereunder; the collision occurred within the territorial limits of Maryland. The federally owned plane was piloted by one Captain Julius R. McCoy, a rated pilot and a commissioned officer of the Air Guard, employed full time in civilian status as a maintenance technician holding the classified position of Aircraft Maintenance Chief. At the time of the accident the Maryland Air National Guard was not in the active service of the United States.

The trial court found that the sole proximate cause of the accident was "the negligence and wrongful conduct" of the pilot of the federally owned plane. This finding is not challenged here. The trial court also found that at the time of the accident the pilot was acting in his capacity as an "air technician," and, as such, "was a civil employee of the United States acting within the scope of his employment." This finding, on which the respondeat superior liability of the defendant was predicated, is challenged as clearly erroneous and legally unsupportable. We find it necessary to dispose of two preliminary questions before entering upon a consideration of the principal issues raised by these appeals.

Preliminary Questions

The plaintiffs argue that under rule 52(a) Fed. Rules Civ. Proc., 28 U.S.C.A., the trial court's findings of fact may "not be set aside unless clearly erroneous." We do not agree that the "clearly erroneous" test is applicable on the present appeal. The actions were submitted to the trial court on the record made in the consolidated trial of related cases tried in the United States District Court for the District of Columbia. This record consisted primarily, [fol. 711] although not entirely, of depositions and written exhibits as to which there was no dispute.

It has been held by this Court, and others, that under such circumstances the findings of fact are reviewable on appeal and need not be given the weight usually accorded them under the rule. *Surgical Supply Service, Inc.* v.

Adler, 321 F. 2d 536, 539 (3rd Cir. 1963); *Mayo* v. *Pioneer Bank & Trust Company*, 297 F. 2d 392, 395 (5th Cir. 1961); *Merchants National Bank and Trust Co.* v. *United States*, 246 F. 2d 410, 417 (7th Cir. 1957), cert. den. 355 U. S. 881 (1957), reh. den. 355 U. S. 920 (1958); *Lang* v. *First Nat. Bank of Houston*, 215 F. 2d 118, 120 (5th Cir. 1954); *In Re Kellet Aircraft Corp.*, 186 F. 2d 197, 200 (3rd Cir. 1950); *Orvis* v. *Higgins*, 180 F. 2d 537, 539, 540 (2d Cir. 1950), cert. den. 340 U. S. 810 (1950). We are in as good a position as was the trial court to evaluate the evidence, draw the inferences of which the evidence is reasonably susceptible, and decide the critical questions raised on this appeal.

We note further that the consolidated trial of the related actions resulted in judgments favorable to the plaintiffs therein concerned. These judgments, one of which was reversed only on the issue of damages, were affirmed on appeal to the United States Court of Appeals for the District of Columbia. *United States* v. *State of Maryland*, 322 F. 2d 1009 (1963). A petition for a writ of certiorari was denied on December 16, 1963, 32 U. S. L. Week 3220. This denial "imports no expression of opinion upon the merits" of the cases involved, *United States* v. *Carver*, 260 U. S. 482, 490 (1923); *House* v. *Mayo*, 324 U. S. 42, 48 (1945); *Sunal* v. *Large*, 332 U. S. 174, 181 (1947), and is therefore of no significance in the instant appeals.

FIRST QUESTION.

The Federal Tort Claims Act imposes liability upon the United States for personal injury or death caused by [fol. 712] the negligence or wrongful act or omission of "any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U. S. C. 1346(b). The term "employee of the government," as defined by statute, "includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal

agency in an official capacity, temporarily or permanently in the service of the United States, . . . " 28 U.S.C. 2671.

The first and most important question for decision is whether the relationship between the United States and Captain McCoy, in his civilian position as an air technician, was that of employer and employee within the meaning of the statute. The determination of the question requires consideration of the historical origin of the National Guard and the constitutional and statutory provisions under which it is organized, maintained, disciplined and regulated in its peacetime status.

Constitutional and Statutory Provisions.

The respective powers of the federal and state governments with relation to the militia forces are defined by Article 1, § 8 of the Constitution, which provides, in pertinent parts, as follows:

> "The Congress shall have Power . . . , to . . . provide for the common Defence and general Welfare of the United States;
>
> "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
>
> "To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the [fol. 713] United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;
>
> . . .; and
>
> "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

These provisions established a division of mutually exclusive powers. There was vested in Congress the limited power to enact laws necessary to the effective organiza-

tion of the militia forces which were deemed necessary to the common defense. There was reserved to the states the right to organize, maintain and regulate such forces and to appoint and commission their officers, a right which existed in and was exercised by the states prior to the adoption of the Constitution. *Selective Draft Law Cases*, 245 U. S. 366, 383 (1918). The quoted clauses made it manifest that the militia units were to remain subject to the control and authority of their respective states until called into the active service of the United States for the special purposes authorized.

The militia forces of the several states are, and, since 1903, have been organized and maintained as units of the National Guard[1] under joint federal-state auspices. *Act of January 21, 1903*, 32 Stat. 775, commonly known as the Dick Act. However, the first comprehensive exercise of the Congressional power was the enactment of the National Defense Act of 1916, 39 Stat. 166, and the amendments contained in the Act of June 4, 1920, 41 Stat. 759.

The cited legislation provided for the reorganization of the Army of the United States, and, as an incident [fol. 714] thereto, the organization and training of the National Guard units of the various states on a basis conforming to that of the Regular Army. However, it should be emphasized that both acts specifically declared that the organized Guard was to be a component of the Army of the United States only "while in the service of the United States." There was in each of the acts a specific recognition by Congress of the constitutional limitations on its power. This legislation did not alter the status of the National Guard units as independent military forces subject to the exclusive jurisdiction of the several states, except when mustered into the active service of the United States.

The enactments of 1916 and 1920 authorized the appropriation of funds for the support of the National Guard and the apportionment thereof among the states

[1] The organized militia units of the several States and Territories were officially designated as the National Guard, a designation used by many of the states prior to the Dick Act.

and territories whose organized units met the standards prescribed by the enactments and the regulations promulgated thereunder by the Secretary of War, a condition precedent to federal recognition. While Congress assumed full responsibility for the financial support of the National Guard units which qualified for federal recognition, it specifically recognized the constitutional authority of the several states and territories to organize, maintain and discipline their respective units under local law.

The statutes also authorized the procurement, at federal expense, of arms, equipment and material, and the issue thereof to the National Guards of the several states and territories upon requisition of their respective governors. As a condition precedent to the allocation of such property, the states were required to make adequate provision for its maintenance and protection. The relevant sections of the Act, and the amendments thereto, provided that the arms, equipment and material issued were to remain the property of the United States and, further, that the states would be held liable for the loss, damage or the destruction of property due to carelessness or neglect. [fol. 715] It is clear that under the statutory plan the possession and control of the allocated property, as well as the responsibility for its care and maintenance in accordance with prescribed standards, were to be committed to the states.

The Acts of 1916 and 1920 were further amended by the Act of June 15, 1933, 48 Stat. 153. The only amendment here relevant (Section 5) established the "National Guard of the United States" as a "reserve component of the Army of the United States," consisting of the "federally recognized National Guard units" of the states. However, the statute did not alter the status of the Guard units or their relationship to the federal government. The amendment specifically provided that "the members of the National Guard of the United States *shall not be in the Active Service of the United States* except when ordered thereto in accordance with law, and, in time of peace, *They Shall be Administered, Armed, Uniformed, Equipped, and Trained in Their Status as the National Guard of the Several States . . .* " (Emphasis supplied).

The laws relating to the military forces, including the National Guard, were revised and codified by the Act of August 10, 1956, entitled "An Act to revise, codify, and enact into law, title 10 of the United States Code, entitled 'Armed Forces', and title 32 of the United States Code, entitled 'National Guard'." 70A Stat. 1. This initial codification was restricted to the statutes which had become effective prior to March 31, 1955. The statutes which became effective thereafter were incorporated into the codification by the Act of September 2, 1958, 72 Stat. 1437. The purposes of the codification were to restate and clarify the existing laws and to eliminate earlier provisions which had become obsolete, particularly those contained in the Acts of 1916 and 1920. The substance of the laws was not changed.

The codification defined, as did the earlier legislation, a division of powers consonant with Article 1, § 8 [fol. 716] of the Constitution, supra. There was reserved to the states the authority to organize, discipline, train and regulate their National Guard units, as theretofore, but in accordance with standards of training and discipline prescribed by the acts of Congress and the regulations promulgated thereunder by either the Secretary of the Army or Secretary of the Air Force. It is clear from the legislation that compliance with these standards was a condition precedent to the right of the states to federal recognition and subsidization.

Discussion.

At all times therein relevant, the pilot of the federally owned plane, Captain McCoy, held a dual status. He was a commissioned officer of the Maryland Air National Guard under appointment by the Governor. *Maryland Code,* Article 65, § 70. As a duly appointed and commissioned officer, he had qualified for federal recognition, pursuant to §§ 305 and 307 of Title 32 U.S.C., and the pertinent regulations, and by reason thereof his military earnings were paid directly from federal funds. We should add that in his military status Captain McCoy was the

"aircraft squadron maintenance officer," a position comparable to the one he held in his civilian capacity.

In his civilian status Captain McCoy was a full-time maintenance technician employed by the Adjutant General of the Maryland National Guard, the person designated by the Secretary of the Air Force as the one authorized to employ civilian personnel. 32 U.S.C. § 709(f). He held the position of Aircraft Maintenance Chief and, as such, was responsible for the civilian employees in the Aircraft Maintenance Section[2] and the care, inspection and repair of aircraft and equipment. *Air National Guard Manual* (ANGM 40-41), p. 107. On the day of the accident he was "Acting Maintenance Supervisor" and, as such, was responsible for the operation of the Maintenance Division [fol. 717] under the general supervision of Lt. Col. Kilkowski, a commissioned officer of the Guard who in civilian status held the position of Base Detachment Commander. *Air National Guard Manual* (ANGM 40-01), pp. 105 and 106. His civilian salary, like his military salary, was paid directly from federal funds pursuant to statutory authorization.

It was on the basis of the facts summarized in the foregoing paragraph that the court below held that Captain McCoy in his civilian status was an employee of the United States, within the meaning of the Federal Tort Claims Act, supra. There is support for this holding in the cases hereinafter considered and upon which the appellees rely.

The appellate courts have uniformly held that the federally recognized members of National Guard units not in active federal service are not employees of the United States within the meaning of the said Act. It has been held that they are employees of their respective states. *Williams* v. *United States,* 189 F. 2d 607 (10th Cir. 1951); *Dover* v. *United States,* 192 F. 2d 431 (5th Cir. 1951); *McCranie* v. *United States,* 199 F. 2d 581 (5th Cir. 1952), cert. den. 345 U. S. 922; *Storer Broadcasting Company* v. *United States,* 251 F. 2d 268 (5th Cir. 1958), cert. den. 356 U. S. 951; *Patino* v. *United States,* 311 F. 2d 604

[2] A section within the Maintenance Division which was under the supervision of the Base Detachment Commander.

(10th Cir. 1962), cert. den. 373 U. S. 911. But see *O'Toole* v. *United States*, 206 F. 2d 912 (3rd Cir. 1953).[3] We should emphasize that in each of the cited cases the Court regarded as of no significance the following facts: the Guard member had qualified for federal recognition, was compensated directly from federal funds, and was in possession and control of a federally owned vehicle involved in the accident which gave rise to claims for personal injury.

These appellate courts have held, also uniformly, that enlisted members of the National Guard, employed in civilian status as maintenance technicians pursuant to [fol. 718] federal regulations, are employees of the United States within the meaning of the said Act. *United States* v. *Holly*, 192 F. 2d 211 (10th Cir. 1951); *Elmo* v. *United States*, 197 F. 2d 230 (5th Cir. 1952); *United States* v. *Duncan*, 197 F. 2d 233 (5th Cir. 1952); *Courtney* v. *United States*, 230 F. 2d 112 (2nd Cir. 1956);[4] *United States* v. *State of Maryland*, supra. We emphasize that in each of these cases the Court regarded as significant, and somewhat determinative, the following facts: the maintenance technician qualified for employment under federal regulations, was paid directly from federal funds, and was responsible for the repair and maintenance of federally owned equipment in accordance with prescribed regulations. The courts held that by reason of the regulations under which the maintenance technician was employed and compensated, performed his duties, and was responsible for the maintenance of federally owned property, he was under the direction and control of the United States and therefore its employee.

It is difficult for us to perceive how factors may be considered immaterial in one situation and material in another which is comparable. We are of the view that the rationale upon which the distinction has been held to rest is untenable for the reasons hereinafter discussed.

The Maryland Air National Guard, although federally recognized, was an independent military force of the State

[3] It was held that members of the National Guard of the District of Columbia were federal employees.

[4] But see dissenting opinion of Chief Judge Lumbard.

under the command jurisdiction of the Governor as "Commander-in-Chief of the land and naval forces of the State." *Maryland Constitution, Article I,* § 8, *Maryland Code,* supra, § 6. The Governor was empowered to make such rules and regulations as were necessary to the appropriate "organization, discipline, training and equipment" of the Guard in conformity with "the National Defense Act,[5] the amendments thereto,[6] and regulations made in pursuance [fol. 719] thereof." Ibid. The Air Guard was under the immediate command of an Adjutant General "appointed by the Governor by and with the advice and consent of the [State] Senate." *Maryland Code,* supra §§ 6, 9 and 10; 32 U.S.C. § 314(a). The Military Department of the State was under the control of a ranking line officer on "active duty status" who, as Quarter Master General, was responsible "for the care, preservation and safekeeping of all military property," including that allocated to the Air Guard by the federal government. *Maryland Code,* supra, §§ 10 and 11.

The federally owned jet trainer involved in the collision had been purchased for and allocated to the Maryland unit pursuant to § 702 of Title 32 U.S.C., the pertinent provisions of which read as follows:

> "(a) Under such regulations as the President may prescribe, . . . the Secretary of the Air Force may buy . . . and, upon requisition of the governor of any State . . . issue to its . . . Air National Guard, . . . the supplies necessary to uniform, arm, and equip that . . . Air National Guard for field duty.
>
> "(d) No property may be issued to the National Guard of a State . . . unless that jurisdiction makes provision, satisfactory to the Secretary concerned, for its protection and care."

While the plane remained the property of the United States, 32 U.S.C. § 710(a), it was committed to the possession and control of the Maryland Guard for its exclusive use.

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[5] Act of August 10, 1956, supra.

[6] Act of September 2, 1958, supra.

The plane was loaned to the State of Maryland under statutory terms and conditions which were essentially contractual. The State was granted exclusive possession and control of the craft on condition that it assume full responsibility for its care and maintenance, in accordance with federally prescribed standards, and liability for any loss or damage occasioned by negligence. 32 U.S.C. § 710(c). These conditions were limited to those which were essential to insure the care and protection of prop- [fol. 720] erty purchased with federal funds. The State could be relieved of its accountability only under the conditions prescribed by statute. 32 U.S.C. §§ 704, 710 and 711.

The employment of Captain McCoy as a maintenance technician was pursuant to the pertinent provisions of § 709(a) and (f) of Title 32 U.S.C., which read as follows:

> "(a) . . . Under such regulations as the Secretary of the Air Force may prescribe, funds allotted by him for the Air National Guard may be spent for the compensation of competent persons to care for material, armament, and equipment of the Air National Guard . . .
>
> "(f) The Secretary concerned shall fix the salaries of clerks and caretakers authorized to be employed under this section, and shall designate the person to employ them."

These provisions vested in the Secretary of the Air Force the right to spend federal funds for the employment and "compensation of competent persons," and the authority to designate the person by whom they were to be employed. There was no other right or authority vested in the Secretary. The statute merely authorized compensation of state employed caretakers from federal funds, an authorization consistent with subsidization.

The person designated by the Secretary, pursuant to subdivision (f), supra, was the Adjutant General of the Maryland National Guard. He was authorized by appropriate regulation "to employ, fix rates of pay, establish work hours (a minimum of 40 hours per week), supervise, and discharge employees within the purview of [the] regu-

lation; subject to the provisions of law and such instructions as may be subsequently issued by the Chief, National Guard Bureau." *Air National Guard Regulations* (ANGR 40-01). The enumerated functions were exercised by the Adjutant General as the duly appointed representative of the State of Maryland; he was responsible only to the [fol. 721] Governor. The right to employ maintenance technicians and other personnel and, as an incident thereto, supervise their work and the manner of its performance, was vested in the Adjutant General, as the representative of the State of Maryland. See *Harris* v. *Boreham,* 233 F. 2d 110 (3rd Cir. 1956).

The United States Court of Appeals for the District of Columbia Circuit concluded in the companion case, *United States* v. *State of Maryland,* supra, p. 1012, that Captain McCoy "in his civilian capacity as a caretaker of property of the United States" was an employee of the United States within "the terms of the Federal Tort Claims Act." The conclusion appears to be predicated on the same rationale as the earlier cases; in fact, the earlier cases are cited in support of it.

The Court stated, at page 1013:

> "In his property maintenance function he was paid by, and the ultimate right of control over him was in, the United States. The functions lodged by the United States in the State Adjutant General did not serve to supplant this right of control in the United States, though it may be said to have been ancillary thereto. Such supervision as was lodged in the State did not make Captain McCoy an employee of Maryland . . . There is of course a close relationship between the State of Maryland and the United States in the maintenance of federal property allocated to the Maryland National Guard, but this does not tip the balance toward the State on the issue of employment; for too much begins and remains with the United States in the case of these caretakers of federal property."

We cannot agree with either the conclusion or the tenuous premise upon which it rests.

[fol. 722] We have here a classic situation, of which there are many examples,[7] in which the Congress has undertaken the financial support of a state activity in the national interest, on condition that the activity conform to the congressional enactments and the regulations promulgated thereunder. The Congress, consistent with the limited power vested in it by Article I, § 8 of the Constitution, supra, has undertaken to subsidize the National Guard units of the respective states, on condition that they be organized, maintained, disciplined and equipped in accordance with federally prescribed standards.

It is evident that the only purposes of the pertinent statutes, and the regulations promulgated thereunder, were to insure the effective organization of the National Guard and to protect federal funds against unrestricted expenditure, both in the national interest. There is nothing in the legislation which would indicate that it was the intent of Congress to either interfere with the right of the states to organize the Guard or deprive the states of the right to employ, supervise and control such civilian personnel as were deemed essential to the support of the Guard. We are of the view that in their relationships to the United States there is no distinction between a federally recognized member of the Guard and a federally recognized maintenance technician employed in his civilian capacity. A member of the Guard may qualify for federal recognition and compensation from federal funds only if he meets the standards prescribed by federal regulation; a maintenance technician may qualify for employment and compensation from federal funds only if he likewise meets the standards prescribed by federal regulation.

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[7] The Federal Aid Highway Act of 1958, 23 U.S.C. 101, et seq., under which Congress authorized the expenditure of federal funds and the apportionment thereof among the several states which assumed responsibility for the construction of highways as part of an interstate system of roads; the Hill-Burton Act and the amendments thereto, 42 U.S.C. 291, et seq., which authorized the appropriation of federal funds and the apportionment thereof among the several states, for the construction of hospitals and similar facilities.

[fol. 723] We are of the opinion, and so hold, that at the time of the accident Captain McCoy, in his capacity as maintenance technician, was an employee of the State of Maryland subject to the supervision and control of the Base Detachment Commander, who was in turn under the supervision and control of the Adjutant General. Captain McCoy was not a federal employee within the meaning of the Federal Tort Claims Act, supra.

SECOND QUESTION

However, even if we assume that Captain McCoy, in his civilian capacity, was an employee of the United States, there remains a further question for decision. Was he acting within the scope of his employment as a maintenance technician at the time of the accident? Otherwise stated, was the activity in which he was engaged related to his employment as a maintenance technician and in furtherance of an interest of his alleged employer? The question must be decided under the law of Maryland, the place of the tortious conduct. 28 U.S.C. § 1346(b); *Richards* v. *United States*, 369 U.S. 1 (1962); *Pattno* v. *United States*, supra. The ultimate test is the relation or nonrelation of the tortious conduct to his work as a civilian employee. If Captain McCoy's activity at the time of the accident was within his line of duty as a member of the Guard, the United States cannot be held liable under the Federal Tort Claims Act. See the cases hereinabove cited.

It is the law of Maryland that an employer may be held liable in damages for personal injury or death caused by the tortious conduct of his employee only if, at the time of the accident, the employee was engaged in an activity in connection with the purposes of his employment and in furtherance of objects within his line of duty. *Lewis* v. *Accelerated Transport-Pony Express, Inc.*, 148 A. 2d 783 (1959); *Globe Indemnity Company* v. *Victill Corporation*, 119 A. 2d 423, 427 (1956); *Eyerly* v. *Baker*, 178 A. 691, 696 (1935). The decisive test of the employer-employee rela-[fol. 724] tionship, essential to the creation of liability, is the right of the employer to direct and control the employee at the time and in respect to the very occurrence out of

which the accident arose. *Greer Lines Company* v. *Roberts*, 139 A. 2d 235, 239 (1958); *Gallaghers Estate* v. *Battle*, 122 A. 2d 93, 98 (1956); *Henkelmann* v. *Metropolitan Life Ins. Co.*, 26 A. 2d 418, 423 (1942). The test is particularly applicable in the instant case.

In his military capacity Captain McCoy was a rated aeronautical officer assigned to the 104th Fighter-Interceptor Squadron of the Maryland Air National Guard. He was a qualified aviator and, as such, was permitted to fly federally owned aircraft when authorized to do so by the Base Detachment Commander. To maintain his level of efficiency and, incidentally, to retain his flying status, Captain McCoy was required by regulation to participate in the prescribed training programs and, in connection therewith, spend a minimum number of hours per year in aerial flight.[8]

These flights were designated as "proficiency flights," as distinguished from "functional check flights" which as the term indicates, had a different purpose. The proficiency flights had for their prime purpose training to improve flying skills. The training programs were under the control, supervision and command jurisdiction of the officers of the Maryland Air National Guard, subject only to the requirement that the programs conform to the standards prescribed by the Air National Guard Bureau. 32 U.S.C. § 501; *Air National Guard Regulation* No. 50-01.

In his military capacity Captain McCoy also held the position of "aircraft squadron maintenance officer." The duties and responsibilities of this post were somewhat similar to those of the maintenance technician. They were carried out under the command jurisdiction of Colonel [fol. 725] Kilkowski, as squadron commander, a military post. Captain McCoy testified, as did Colonel Kilkowski, that on every flight the "squadron maintenance officer" would evaluate the performance of the aircraft and report

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[8] The regulations fixed the minimum and maximum number of flight hours. When the maximum number of hours had been accumulated, a flying officer was no longer eligible for flight pay. Captain McCoy was in this situation at the time of the accident. However, the accumulation of additional hours was relevant to the officer's rating.

thereon to the appropriate officer. This was admittedly normal procedure even though the flight was one for the "purpose of maintaining flying proficiency."

The accident occurred on Tuesday, May 20, 1958, a day on which Captain McCoy was employed in his civilian capacity. He reported for work at the usual hour and, before taking off on the fateful flight, performed certain administrative duties related to his civilian employment.[9] However, pursuant to arrangements previously made, Colonel Kilkowski authorized Captain McCoy to make a "proficiency flight." The written Flight Order specifically designated the flight as one "for purpose of maintaining flying proficiency." Captain McCoy also had permission to carry a passenger, a member of the Army Reserve who was interested in joining the Air Guard. It appears from the undisputed testimony that the flight was not a "functional check flight," which is one made in connection with aircraft maintenance, and requires a minimum crew of two qualified men.

At the time of the accident Captain McCoy was engaged in a training flight which was under the control and supervision of the authorized military personnel of the Maryland Air National Guard. He was not acting within the scope of his employment as a maintenance technician but was acting within his line of duty as a commissioned aeronautical officer of the Guard. The fact that he was not eligible for flight pay and was retained in the civilian payroll status is of no relevance.[10] It is similarly of no relevance that in accordance with normal flight procedure he checked [fol. 726] the performance of the aircraft and reported thereon. This was his responsibility as "squadron maintenance officer," a military post.

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[9] On the day in question, Captain McCoy was carried in civilian pay status. He had accumulated the maximum hours of flight time for the period and could not qualify for flight pay.

[10] The accumulation of the maximum number of flight hours was not a bar to additional proficiency flights; in fact, it appears from the testimony that the number of hours spent in aerial flight was a factor in the evaluation of a pilot's proficiency and, consequently, his rating.

After the accident Captain McCoy, having sustained injury, filed a written notice of claim for the benefits allowable under the Federal Employees' Compensation Act, 5 U.S.C. § 751. This claim was supported by the certificate of Lt. Col. Ebaugh, United States Property Fiscal Officer for the State of Maryland. The certificate stated that Captain McCoy was working "as a Civil Employee of the United States at the time of injury and not as a member of the Maryland National Guard." The claim was approved by the Department of Labor and the benefits allowable under the Act were paid. Whether the claim was properly or improperly approved we need not decide.

The appellees here argue that the certification, coupled with the subsequent approval of the claim for payment, was tantamount to a binding admission that Captain McCoy was a civil employee of the United States at the time of the accident. The argument is untenable for two reasons. An admission such as that made by Lt. Col. Ebaugh, unlike a judicial admission, is in no sense final and conclusive so as to bind the party on whose behalf it was purportedly made. *C. H. Elle Construction Co.* v. *Western Casualty & Sur. Co.*, 294 F. 2d 459, 461, 462 (9th Cir. 1961); *State Farm Mut. Auto Ins.* v. *Porter*, 186 F. 2d 834, 842 and 843 (9th Cir. 1950). The acceptance of the claim for compensation, supported as it was by Lt. Col. Ebaugh's statement, is of no significance. The doctrines of res judicata and equitable estoppel do not ordinarily apply to administrative determinations. *Jason* v. *Summerfield*, 214 F. 2d 273 (D.C. Cir. 1954), cert. den. 384 U.S. 840; *Niagara Mohawk Power Corp.* v. *Federal Power Commission*, 202 F. 2d 190 (D.C. Cir. 1952), aff'd. 347 U.S. 239. This is particularly true where, as here, the administrative determination is subject to review at any time by the agency which made it. 5 U.S.C. §§ 787 and 788.

[fol. 727] The judgments of the court below will be reversed and the actions remanded with directions that judgments be entered in favor of the defendant.

HASTIE, *Circuit Judge, concurring in result.*

I agree with Judge Smith that the flight during which this accident occurred was not an undertaking of a civilian caretaker in performance of his responsibility for aircraft maintenance. Rather, it was a "proficiency flight", a training activity, properly undertaken by Captain McCoy in his capacity as an officer of the Maryland Air National Guard.

The fact that any incidental observations this pilot might make concerning the performance of his plane would be communicated to and used by civilian technicians in the servicing or maintenance of the plane did not change the basic character of this training flight. Neither, as I see it, did it matter that the officer flying the plane had a second military responsibility as "squadron aircraft maintenance officer" and a separate and distinct civilian job at the airfield as a caretaker and aircraft technician. We all agree that in his capacity as a National Guard officer, whether functioning as a pilot or as the squadron aircraft maintenance officer, Captain McCoy was not a federal employee within the meaning of the Federal Tort Claims Act. I think it is irrelevant that as a civilian caretaker and mechanic he might put to use the information he had acquired during the performance of one or both of his other responsibilities as a National Guard officer.

The considerations and conclusions stated in the foregoing paragraph are a sufficient basis for reversing the judgment of the district court and requiring the dismissal of this action. Therefore, I do not reach the more difficult and far-reaching question, whether a civilian caretaker and technician, employed as provided in section 709 of Title 32, United States Code, is a federal employee within the meaning of the Tort Claims Act.

[fol. 728] I join in the decision reversing the judgment of the district court, but without expressing any opinion upon that portion of the disagreement between my colleagues which concerns the status of civilian aircraft maintenance workers employed to care for federally owned planes while in the custody of National Guard units.

STALEY, *Circuit Judge, dissenting.*

In my judgment the decision of the majority is erroneous for the reason that it is premised on the resolution of a question which is not germane to the issue in this case. The majority reasons that constitutional and historical considerations make it manifest that, for the purposes of the Federal Tort Claims Act, members of the Air National Guard are state and not Federal employees. Until today that question had been left open in this Circuit. *O'Toole* v. *United States,* 206 F.2d 912 (C.A.3, 1953). In the Second Circuit, see *Courtney* v. *United States,* 230 F.2d 112 (C.A.2, 1956). In my view, the United States maintains such control over members of the National Guard even while they have not been called into active service that they are "employees of the Government" within the meaning of the Federal Tort Claims Act. But I leave that question to another day, for, as the majority states, "The first and most important question for decision is whether the relationship between the United States and Captain McCoy, *in his civilian position as an air technician,* was that of employer and employee within the meaning of the statute." (Emphasis supplied.) On this question, historical and constitutional considerations as to the status of members of the National Guard are simply not relevant. For we are concerned with the status of Captain McCoy, not as a member of the National Guard, but as a civilian caretaker or air technician employed under 32 U.S.C. §709(a) "to care for material, [fol. 729] armament, and equipment of the Air National Guard * * * " which is property of the Federal Government.

On this, the vital question in this case, the majority candidly admits that each and every one of the reported cases is arrayed against it, for each of them holds that when acting in this capacity such a caretaker is an "employee of the Government" within the meaning of the Federal Tort Claims Act. See the cases cited in the majority opinion.

The undisputed evidence in this case makes it abundantly clear that in addition to his duties as a member of the Air National Guard, Captain McCoy was employed as a civilian maintenance technician pursuant to 32 U.S.C.

§ 709. Indeed, the record shows that the major portion of his salary resulted from his employment in this capacity, and that he was so employed on the very day of this tragic accident. Pursuant to § 709(f), his salary was fixed by the Secretary of the Air Force, who had designated the Adjutant General of the Maryland National Guard to employ him. Thus, in this capacity, McCoy was employed under Federal law, received his pay from Federal funds, cared for Federal property, and his duties were fixed by Federal regulation. As the Court of Appeals for the District of Columbia has held with respect to this very individual in companion suits brought by the survivors of others killed in this catastrophe, "In his property maintenance function he was paid by, and the ultimate right of control over him was in, the United States," *United States* v. *State of Maryland, for the Use of Meyer,* 322 F.2d 1009, 1013 (C.A.D.C.), cert. denied, U.S. (1963). For an excellent exposition of these and additional factors which compel the conclusion that a caretaker is an employee of the Federal Government, see *Elmo* v. *United States,* 197 F.2d 230 (C.A.5, 1952), and *United States* v. *Holly,* 192 F.2d 221 (C.A.10, 1951). We specifically approved the rationale of *Holly* in *O'Toole* v. *United* [fol. 730] *States,* 206 F.2d at 916. Thus, the effect of the majority's decision is to overrule our decision in that case.

The majority finds it difficult to perceive how the incidents of employment I have mentioned are material in considering McCoy's employment status as a civilian caretaker, but are not decisive in determining his employment status as a member of the National Guard. I have no such difficulty. There can be no question but that these indicia of employment represent significant, if not conclusive factors, in determining the employer-employee relationship. See *National Labor Relations Board* v. *Howard Johnson Co.,* 317 F.2d 1 (C.A.3, 1963), cert. denied —— U.S. —— (196). Hence, in ordinary circumstances, members of the National Guard would be considered Federal employees because substantial elements of control over them are vested in the United States. However, because of the constitutional provision with respect to the militia, several cases have held that members of the National Guard who have not been

called into active service are state and not Federal employees. See the cases cited in the majority opinion. I have already indicated my disagreement with that conclusion. But, in any event, there is no such constitutional or statutory provision with respect to civilian caretakers. Accordingly, in determining their employment status an analysis of the incidents of employment is of critical significance. As has been previously indicated, such an analysis of McCoy's status as a civilian caretaker of Federal property leads to the ineluctable conclusion that, in this capacity, he was an employee of the United States.

The majority states that as a full time maintenance technician McCoy was "employed by the Adjutant General of the Maryland National Guard." But this observation is not persuasive, for under 32 U.S.C. § 709(f), "the Secretary concerned shall fix the salaries of clerks and caretakers authorized to be employed under this section, and shall designate the person to employ them." [fol. 731] Thus in employing McCoy the Adjutant General was merely acting as the designee of the Secretary of the Air Force. As was stated in *United States* v. *State of Maryland, for the Use of Meyer*, 322 F.2d at 1013:

> "* * * The functions lodged by the United States in the State Adjutant General did not serve to supplant this right of control in the United States, though it may be said to have been ancillary thereto. Such supervision as was lodged in the State did not make Captain McCoy an employee of Maryland. A foreman, for example, is not the employer of the one whose work he may in some respects supervise. There is of course a close relationship between the State of Maryland and the United States in the maintenance of federal property allocated to the Maryland National Guard, but this does not tip the balance toward the State on the issue of employment; for too much begins and remains with the United States in the case of these caretakers of federal property."

In this setting, to hold that McCoy was a state and not a Federal employee for the purposes of the Federal Tort

Claims Act is to thwart the remedial purposes for which that statute was enacted.

The majority also concludes that, assuming that Captain McCoy in his civilian capacity was an employee of the United States, he was not acting within the scope of his employment as a maintenance technician at the time of the accident. The plain answer to this conclusion is, as the Government concedes in its brief, that it is contradicted by the undisputed testimony of both Captain McCoy and his commanding officer. The testimony of the commanding officer who gave permission for the flight in question was given at the trial of the companion case in the District of Columbia. That testimony was made a part of the record in this case by the agreement [fol. 732] of the parties.[1] As indicated in the opinion of the Court of Appeals for the District of Columbia, the commanding officer testified as follows:

> "A. The general reason for any flight of this nature is proficiency. You don't set up a flight for the express purpose of taking any individual up, the express purpose for flying is for your own general proficiency. If there is a seat available and the man qualifies in accordance with the regulations, it is permissible to take him up on that flight. The Air Force does it all the time.
>
> "Q. Were there other reasons for the flight in question?
>
> "A. I think as I mentioned before, a third person for any flight is to insure that the equipment is in

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[1] In that portion of its brief describing the proceedings in the district court, the Government relates that:

"The evidence at the trial on that issue consisted of the testimony of Captain McCoy, and his commanding officer, Lt. Col. Kilkowski, and others, and numerous exhibits and depositions, including the deposition of Major General Winston P. Wilson of the Arkansas Air National Guard, who has been on active (Federal) duty in the National Guard Bureau of the Department of Defense as the Assistant Chief for the Air National Guard. Both Captain McCoy and Lt. Col. Kilkowski testified that in their opinions they believed that Captain McCoy was performing duties in his civilian capacity as well as his military capacity, at the time of the accident."

proper working order, to—well, as a result of each flight the maintenance officer takes, he has to fill out a form, whether the aircraft was okay, or whether it had even minor discrepancies which would be listed in the form. When he lands and comes back from the flight, this is done; so there is a third reason for the flight, which is to insure the proper maintenance of the equipment which he has general supervision over.

"Q. As an aircraft technician?

"A. As an aircraft maintenance officer in the squadron and also as an air technician."

United States v. *State of Maryland for the Use of Meyer*, 322 F.2d at 1012.

[fol. 733] The testimony of Captain McCoy is to the same effect. Certainly, in the light of this uncontroverted evidence, I cannot say that the district court erred in concluding that Captain McCoy was acting within the scope of his employment as a maintenance technician at the time of this accident.

I think that no more need be said; I would affirm the judgments of the district court.

[fol. 734] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14,041

STATE OF MARYLAND for the use of NADINE Y. LEVIN, individually, and as next friend, mother and guardian of and for the use of JOY ELLEN LEVIN, an infant under the age of 14 years; and MELLON NATIONAL BANK AND TRUST COMPANY as Executor of the Estate of JACK LEVIN, deceased,

vs.

UNITED STATES OF AMERICA, Appellant.

(D. C. Civil Action No. 17503)

On Appeal From the United States District Court for the Western District of Pennsylvania

---

Present: Staley, Hastie and Smith, *Circuit Judges.*

JUDGMENT—April 1, 1964

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment, filed December 20, 1961 and entered December 21, 1961, of the said District Court be, and the same is hereby reversed, with costs, and the action remanded with directions that judgment be entered in favor of the defendant.

[fol. 735] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14,042

STATE OF MARYLAND for the use of SYDNEY L. JOHNS, and KENNEDY SMITH as Executor of the Estate of RUTH M. SMITH, deceased,

vs.

UNITED STATES OF AMERICA, Appellant.

(D. C. Civil Action No. 17541)

On Appeal From the United States District Court
for the Western District of Pennsylvania

Present: Staley, Hastie and Smith, *Circuit Judges.*

JUDGMENT—April 1, 1964

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment, filed December 20, 1961 and entered December 21, 1961, of the said District Court be, and the same is hereby reversed, with costs, and the action remanded with directions that judgment be entered in favor of the defendant.

[fol. 736] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 14,041 and 14,042

STATE OF MARYLAND for the use of NADINE Y. LEVIN, et al., Plaintiff-Appellees,

v.

UNITED STATES OF AMERICA, Defendant-Appellant.

STATE OF MARYLAND for the use of SYDNEY L. JOHNS, et al., Plaintiff-Appellees,

v.

UNITED STATES OF AMERICA, Defendant-Appellant.

Present: Biggs, *Chief Judge*, McLaughlin, Kalodner, Staley, Hastie, Ganey and Smith, *Circuit Judges*.

ORDER DENYING PETITION FOR REHEARING—April 28, 1964

The petition for rehearing filed by State of Maryland for the use of Nadine Y. Levin, et al., Plaintiff-Appellees, and State of Maryland for the use of Sydney L. Johns, et al., Plaintiff-Appellees, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Staley would grant rehearing.

By the Court, William F. Smith, Judge.

[fol. 737] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 738]

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1964

STATE OF MARYLAND, for the use of NADINE Y. LEVIN, et al., Petitioners,

vs.

UNITED STATES.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—June 23, 1964

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 25, 1964.

William J. Brennan, Jr., Associate Justice of the Supreme Court of the United States.

[fol. 739]

SUPREME COURT OF THE UNITED STATES

No. 345, October Term, 1964

MARYLAND for the use of NADINE Y. LEVIN, SYDNEY L. JOHNS, et al., Petitioners,

vs.

UNITED STATES.

ORDER ALLOWING CERTIORARI—October 19, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below whicl accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

Supreme Court of the United States

October Term, 1964

No. ~~845~~

STATE OF MARYLAND for the use of
NADINE Y. LEVIN, *et al.*,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant.

STATE OF MARYLAND for the use of
SYDNEY L. JOHNS, *et al.*,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

THEODORE E. WOLCOTT,
Attorney for Petitioners.

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IN THE

Supreme Court of the United States

October Term, 1964

No.

STATE OF MARYLAND for the use of NADINE Y. LEVIN, *et al.*,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant.

STATE OF MARYLAND for the use of SYDNEY L. JOHNS, *et al.*,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nadine Y. Levin, individually, and Joy Ellen Levin, an Infant by Nadine Y. Levin, her Guardian, and Mellon National Bank and Trust Co. as Executor of Jack Levin, deceased; Sidney L. Johns, individually, and Kennedy Smith, as Executor of the Estate of Ruth Johns, deceased, petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Third Circuit entered in these cases on April 1, 1964 and April 28, 1964.

Opinions Below

The findings of fact and conclusions of law of the district court (Plaintiffs' Appendix 1b-20b[1]) are also reported in *State of Maryland for the use of Levin* v. *United States*, 200 F. Supp. 475 (W. D. Pa. 1961). The majority and dissenting opinions herein of the Court of Appeals below reversing the District Court by decision dated April 1, 1964 have not yet been reported. A copy of this decision is attached in the Appendix hereto at page 1a.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). Petitioner's application for re-hearing in the court below was timely filed on April 15, 1964 and was denied on April 28, 1964. By order dated June 23, 1964, this court extended the time herein for filing a petition for a writ of certiorari to and including September 25, 1964.

Preliminary Note

At the outset the court's attention is respectfully called to the following:

> 1. The divided Court of Appeals below reached a result on the same issues of law and fact diametrically opposed to that reached in a companion case arising out of the same air collision in Maryland and decided on the same record by the unanimous Court of Appeals for the District of Columbia in *State of Maryland for the use of Meyer, Brady and Capital Airlines* v. *United States of America*, 322 Fed. 2d 1009, decided June 13, 1963 (Cert. den. 375 U. S. 954, Dec. 16, 1963), hereinafter referred to as *Meyer*.

[1] "Plaintiffs' Appendix" References are to the "Appendix to Plaintiffs' Brief" filed in the Court of Appeals below and with the record in this Court.

2. The United States has stated that it will not oppose this petition. (Motion of United States for conditional rehearing of its Petition for a Writ of Certiorari in the *Meyer* case, No. 543, at page 4.)

Questions Presented

1. Is a person who is employed on a full-time basis under the provisions of 32 U. S. C. § 709 (a), as a civilian caretaker of federal property, an employee of the United States?

2. If a person so employed is an employee of the United States, then, was the right of the United States to control him at the time of the occurrence such, that the United States, if a private person, under the respondeat superior law of Maryland, would be liable for his negligence under the Federal Tort Claims Act?

Statutes and Regulations Involved

1. The pertinent provisions of the Federal Tort Claims Act (Title 28, United States Code Sec. 1346 (b) and Sec. 2671 are set out in Appendix hereto page 27a.

2. The National Defense Act of 1916 (39 Stat. 166) as amended, provides in pertinent part (Title 32, United States Code):

> Section 709. *Caretakers and clerks.*
>
> "(d) Under regulations to be prescribed by the Secretary concerned, one commissioned officer of the National Guard in a grade below major may be employed for each pool set up under subsection (c) and for each squadron of the Air National Guard. Commissioned officers may not be otherwise employed under this section. * * *
>
> (f) The Secretary concerned shall fix the salaries of clerks and caretakers authorized to be employed under this section, and shall designate the person to employ them."

There are additional pertinent parts of regulations showing the close governmental control over McCoy and the maintenance of its aircraft which will be found in the Petitioner's Appendix to this brief. These are the following:

Plaintiffs' Exhibit No. 15, National Guard Regulations No. 75-16. (App. p. 28a)

Plaintiffs' Exhibit No. 16, National Guard Regulations No. 75-16, Superseded. (App. p. 31a)

Plaintiffs' Exhibit No. 17, ANGR 40-01. (App. p. 32a)

Plaintiffs' Exhibit No. 3, ANGM 40-01, Air National Guard Manual. (Pet. App. p. 34a)

Defendant's Exhibit No. 7, AFR 45-2. (App. p. 48a)

Defendant's Exhibit No. 9, ANGR 50-01. (App. p. 49a)

The following statutes are also set out in the Appendix:

5 United States Code 751. (App. p. 50a)

Article 1A, sec. 10, Maryland Annotated Code 1951. (App. p. 51a)

Statement

These are actions under the FTCA against the United States for the wrongful deaths of the plaintiffs' decedents, Levin and Johns, who were passengers in a Capital Airlines Viscount airplane, which was struck in midair by a T-33 jet fighter plane owned by the defendant, United States, but which had been allocated to the Maryland Air Guard as part of the overall national defense plans of the Air Force through the National Guard Bureau. Both aircraft were destroyed and all of the passengers and crews killed except

the pilot of the T-33 jet, Julius McCoy. At the time of the accident he was employed as a full-time civilian air maintenance technician under Sec. 709 (*supra*) as a caretaker of United States property engaged in duties of such employment. The findings of the District Court that McCoy was negligent and its allowance of damages were not disputed by the United States on its appeals from the judgments of that court.

The proceedings below and in the companion *Meyer* cases:

The findings of fact of the trial court, Gourley, *J.* (Plaintiff-Appendix 1b-20b) were made on the record in the prior consolidated trials of the companion *Meyer* cases in which Judge Mathews (District Judge, District of Columbia) after hearing testimony of witnesses in open court, including McCoy, had found that at the time of the accident McCoy was a civil employee of the United States acting within the scope of his employment within the meaning of FTCA. (Judge Holtzoff later overruled the Government's motion for reconsideration of this issue.) The transcript of the evidence and exhibits in the *Meyer* consolidated trials were received in evidence in the instant *Levin* cases by the district court and virtually constituted the entire record on appeal before the Court of Appeals below. By permission of the court below the *Meyer* transcript, exhibits and the opinion, Findings of Fact and Conclusions of Law of U. S. Distract Judge Mathews were reproduced and bound together as Plaintiff's Exhibits Volumes 1, 2 and 3 and were handed up as part of the record on appeal therein. References herein made to that part of the record on appeal below will refer to pages of these three bound volumes as "Pl. Exh. " unless otherwise specifically noted.

The United States, in the above-mentioned *Meyer* cases appealed to the Court of Appeals for the District of Columbia. The judgments in the *Meyer* cases holding that McCoy

was a civilian employee of the United States acting in the scope of his employment at the time of the occurrence within the purview of the Federal Torts Claim Act, were affirmed in *United States to the use of Meyer* v. *State of Maryland*, 322 Fed. 2d. 1099 (*supra*).

In the instant *Levin* cases, the United States had also appealed from the judgments in the District Court in favor of the plaintiffs to the Court of Appeals for the Third Circuit. After the appeals in the *Levin* cases were argued and while decision therein was being awaited, the companion *Meyer* cases were unanimously affirmed on June 13, 1963. Certiorari was denied, December 16, 1963. It should be noted that in both the *Meyer* and *Levin* cases the Government's briefs and petition for a writ of certiorari were based upon identical points.

Copies of such *Meyer* decisions were immediately provided to the Court of Appeals below. Notwithstanding this, on April 1st, 1964 the Court below handed down a decision reversing the District Court and directing that judgment be entered in favor of the United States. This decision was by a divided court, the majority split by two separately based opinions by Judges Smith and Hastie, with a dissenting opinion by Judge Staley. Judge Smith held McCoy was not a federal civil employee, Judge Staley held he was, and Judge Hastie "did not reach that question."

The Facts

a. The Federal Civilian Employment Status of McCoy.

The United States owned and provided the airplanes, paid for the fuel, and provided all the equipment for the National Guard Unit based at Martin Field (the 104th Fighter Interceptor Squadron), directly paid the salaries of the civilian personnel employed to maintain such federal property, furnished the spare parts, and made the major repairs (Pl. Ex. 678; Dist. Ct. Find. 3).

On the date of the accident, a Tuesday, McCoy was employed and acting as a full-time civilian air maintenance technician under the provisions of 32 U. S. C. § 709(a) (*supra*, p. 3) pursuant to the federal regulations and standards and paid directly by the Treasurer of the United States. He was also employed on a part time basis on certain weekends in a military capacity as a commissioned officer in the Air National Guard of the State of Maryland (Pl. Exh. 37-38, 41; Dist. Ct. Find. 4).

The National Guard Bureau, headquartered in the Pentagon, is authorized to regulate employment and rates of Compensation of civilian caretakers of federal property; Department of the Army General Order 96, dated November 9, 1951 (32 U. S. C. § 32, which became 32 U. S. C. § 709(a)). (Pl. Exh. 214, Dist. Ct. Find. 6).

Pursuant to 32 U. S. C. § 709(a), the Secretary of the Air Force, through the National Guard Bureau, promulgated Air National Guard Regulation 40-01, dated 20 December, 1954 (hereinafter referred to as ANGR 40-01) delegated certain duties to the Adjutants General of the several states. ANGR 40-01 and Air National Guard Manual 40-01, designated the jobs in the caretaker technician categories and prescribed the requirements, duties, rates of pay, hours and supervision (Pl. Exhs. 655-660; Dist. Ct. Find. 5).

In order to qualify as such air technician (caretaker) McCoy, by order of the Secretary of the Air Force, attended a nine month course for maintenance officers at the United States Air Force Base and Maintenance School at Chanute Air Force Base, Illinois. While attending this school, he was paid by the United States Air Force finance office (Pl. Exh. 43; Dist. Ct. Find. 7).

At the time of the accident, in addition to carrying out his duties as Aircraft Maintenance Chief, McCoy was acting Maintenance Supervisor for the Base in the absence

of Major Mitchell, who was away on a training program (Pl. Exhs. 40, 48, 71; Dist. Ct. Find. 11). The job description for the position of maintenance supervisor provides that it is "desirable" that the incumbent be a rated pilot on flying status to enable him to "make test flights on assigned aircraft" (Pl. Exh. 217; Dist. Ct. Find. 18). In accordance with Air Force Regulations, McCoy flew frequent check flights, supervised maintenance of twenty-eight aircraft, and other equipment owned by the United States, and the seventy-five to eighty civilian maintenance personnel (Pl. Exhs. 37, 38, 40, 47, 58, 59, 68, 70, 71, 81, 306, 605; Dist. Ct. Find. 12) and submitted monthly equipment reports to the National Guard Bureau in Washington (Pl. Exh. 43).

To insure that the unit operated the equipment in accordance with standards prescribed by the United States Air Force, an Air Force officer on active duty with the United States Air Force was stationed at Martin Field (Pl. Exh. 330; Dist. Ct. Find. 9), and Air Force Inspection Teams made inspections (Pl. Exh. 307; Dist. Ct. Find. 10).

If the Air Force found that a civilian employee was not meeting its requirements, it could effect his discharge by stopping his salary. (Pl. Exh. 335; Dist. Ct. Find. 10).

As a full-time air technician, *i.e.*, in his civilian capacity, McCoy was employed at the base during the normal work week from 8:00 A.M. to 4:30 P.M., Tuesday through Saturday, except for two Saturdays a month. On those two Saturdays, he was employed in his military status as an officer in the Air National Guard and as Squadron Maintenance Officer (Pl. Exh. 38; Dist. Ct. Find. 13).

McCoy, in his full-time civilian caretaker air technician, job, was paid an anual salary in the sum of $7,500.00 by check drawn on the Treasury of the United States. Additionally, he was paid approximately $2,000.00 per year by the United States, for his part-time military duties (Pl.

Exh. 41; Dist. Ct. Find. 23) in the Maryland National Guard.

b. Purposes of the Flight by McCoy on the Day of the Accident.

On the morning of Tuesday, May 20, 1958, McCoy reported to the base and commenced work at the usual starting time on his regular full-time civilian caretaker job as aircraft maintenance chief (Pl. Exhs. 67, 68; Dist. Ct. Find. 26), and as acting maintenance supervisor in Major Mitchell's absence (Pl. Exhs. 77-78; Dist. Ct. Find. 11). Before the flight, he performed certain administrative duties, incidental to his civilian job (Pl. Exhs. 67, 78). On the date of the occurrence, he was recorded as present at the base only in his civilian capacity, was carried on the roster in his air technician pay status, and ultimately was paid by the United States Treasurer in this capacity (Pl. Exhs. 77-78; Dist. Ct. Find. 26).

McCoy could only occupy one pay status at a time, either that of a civilian caretaker in maintenance work, or that of a member of the Air National Guard in a military capacity (Pl. Exh. 586-87, Dist. Ct. Find. 24). At the time of the accident, McCoy had accumulated more than the number of flight training hours for which he could earn flight pay under the provisions of AFR 60-2 for the period in question. His flight on May 20, 1958, therefore, was not to earn flight pay (Pl. Exh. 135-6, Dist. Ct. Find. 25). It was not a training mission (Pl. Exh. 80, 121, 136, 146-7, 152-3, 161-3, 586-7). The form used for this flight was all-purpose (Pl. Exh. 69).

McCoy received permission from his immediate superior, Kilkowski, to make the flight. Kilkowski, like McCoy, was employed pursuant to Sec. 709(a) in the air technician position of base detachment commander (Dist. Ct. Find. 14-15). The flight was termed a "proficiency flight." Proficiency flights have multiple purposes, including evaluation of

maintenance of the equipment, which was a responsibility of McCoy in his employment under 32 U. S. Sec. 709(a) (Dist. Ct. Find. 20). During the course of the flight in question, McCoy checked the efficiency of the equipment and evaluated the quality of the maintenance (Pl. Exhs. 162-164, 493-495; Dist. Ct. Find. 21, 22).

McCoy was accompanied on the flight by a passenger, Donald Chalmers, a member of the Maryland Army National Guard. Chalmers had been required to sign a release prior to the flight, releasing *the United States* and the State of Maryland from liability due to "negligence, faulty pilotage, or structural failure of the aircraft" (Plaintiff-Appendix 5, Dist. Ct. Find. 28).

c. Circumstances Subsequent to the Accident Further Confirming the Federal Employment Relationship.

Subsequent to the occurrence, McCoy received benefits under the provisions of the Federal Employees' Compensation Act, 5 U. S. C., § 751, which provides for payment of compensation by the United States to an employee of the United States injured "while in the performance of his duty." The papers pertaining to McCoy's compensation claim (Plaintiff-Appendix 21b-28b) were processed by Col. Ebaugh, United States Property and Fiscal Officer for the State of Maryland, a Federal employee, on forms provided by the U. S. Department of Labor specifically used for caretakers-technicians (Pl. Exh. 240-241). After due investigation (Pl. Exh. 245) Col. Ebaugh certified as follows:

> "I certify that Julius R. McCoy was working as a Civil Employee of the United States at the time of injury and *not* as a member of the Maryland National Guard." (Pl. Ex. 228)

The Bureau of Employees Compensation, U. S. Department of Labor, processed the claim of McCoy and adjudicated that he was injured in the performance of his duty

as an employee of the United States at the time of the accident. Subsequently, at the request of the United States, and pursuant to the above Statute, McCoy executed an assignment to the United States of his rights of action against Capital Airlines and others (Dist. Ct. Find. 29-33). Such assignment, prepared by the United States, stated that he was employed by the Department of the Air Force as an Aircraft Maintenance Chief (Pilot) at the time of the occurrence (Pl. Exh. 225-227). The United States at no time offered testimony to show that a mistake or error was made by either Col. Ebaugh or the Department of Labor.

d. The Additional Admissions by the Government.

It is noteworthy that in its briefs in the Third Circuit and in the District of Columbia Court of Appeals and in its petition for a Writ of Certiorari in the *Meyer* cases the government conceded that McCoy was at least in part engaged in the performance of his duties as a civil air technician at the time of the accident.

In its brief to the Court below, the government in stating the "Questions Presented" said:

> "* * * because he (McCoy) was also performing duties incident to his employment as a civilian employee * * *."

In its brief to the Court of Appeals in the District of Columbia, the Government stated:

> "Regardless of whether Captain McCoy was also acting in his civilian capacity, *the situation presented by this case* * * *" (Emphasis supplied)

In its Petition for the Writ of Certiorari in *Meyer*, page 14, the Government states that the first question is:

> "* * * Whether *civilian personnel* of the National Guard are 'employees of the United States.'" (Emphasis supplied)

Again at page 27 of the aforesaid Petition, the Government states that the air technician, Captain McCoy, was engaged at the time of the accident, in both flight training *and in maintenance activity*:

> "Thus, it would be wholly unreasonable to make the liability of the United States turn upon whether, at the time of the accident, the air technician is engaged in flight training, in maintenance activity, or (like Captain McCoy) in both."

See also Judge Staley's observations to the same effect (Appendix hereto p. 25a).

e. The Air National Guard.

The overall purpose of the National Guard is to provide a pool of combat ready reserve forces to be used in case of a national emergency involving the defense of the United States; 32 U. S. C. Section 102.

The Air National Guard, including the 104th Fighter Interceptor Squadron, operates at large without regard to state boundaries. According to Standing Operating Procedure No. 3, promulgated January 2, 1957 (Defendant's Exh. 3) (Pl. Exh. 663-664), the squadron's overall training area was considered to be the continental United States (Defendant's Circuit Court Brief, Supplemental App. 2a in *Meyer* cases). The Air National Guard had some twenty-four wings of which seventy-three squadrons were equipped with jet fighters. All of these units had a D-Day mission with a major command in the Air Force (Pl. Exh. 321).

In case of emergency or requirement by the Air Force, the 104th was required to be able to get at least fifty percent of its aircraft fully armed in the air in the first hour (Pl. Exh. 333).

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals below has rendered a decision in direct conflict with the decision in the companion cases of the United States Court of Appeals for the District of Columbia on the same facts and issues.

This split decision, reversing the district court, reaches a result diametrically opposed to that previously and unanimously reached by the District of Columbia Court of Appeals in the companion *Meyer* cases where precisely the same issues of agency based upon the same record were before that court. In *Meyer* the court unanimously held (a) that McCoy was a civilian employee of the government and (b) that he was acting within the scope of his employment within the purview of the F.T.C.A. thus fully affirming the district court below on the facts and on the law.

Furthermore, the issues herein are of widespread public importance and are concerned with an ever enlarging area of federal activity.

The reversal by the court below was achieved in a most unusual way. On the pivotal issue of whether McCoy was acting in his capacity as a civilian technician caretaker, Judge Smith was the only judge to directly hold that he was not. Dissenting Judge Staley disagreed fully, and followed the *Meyer* decision. Judge Hastie ignored material evidence and declined to pass upon this basic issue. It is respectfully submitted, as will be shown, that in order to reach a reversal herein the majority below disregarded fundamental rules and rights.

The peculiar feature of this case is such that "the scope of employment" cannot properly be determined without first determining the issue as to whether McCoy was an employee of the United States. Having refused to first

pass upon whether McCoy was a federal employee, Judge Hastie could not properly proceed to pass upon McCoy's function and scope of employment at the time of the accident. If McCoy was a federal employee by reason of Sec. 709(a), then as required by *Williams* v. *United States,* 350 U. S. 857, it was the duty of the court to give the petitioners the benefit of the strong presumptions under Maryland law that McCoy was an employee of the owner of the aircraft and that he was operating it within the scope of his employment. *Scott* v. *James Gibbons Co.,* 192 Md. 319, 62 A. 2d 117. This presumption which applies to the driver of an automobile is made applicable to the operator of an aircraft by Art. 1-A Sec. 10, p. 197, Ann. Code of Md. (Appendix hereto p. 51a). This significant presumption which can only be overcome by uncontradicted and conclusive proof, (*Scott, supra*) was the law of Maryland governing the issue of scope of employment and was brought to the attention of the court of appeals but was completely ignored by it in disregard of the mandate in *Williams* v. *United States,* viz., that the issue of scope of employment be determined in accordance with the law of the state where the wrongful act or omission occurred. Thus the court below decided the scope of employment issue as though there were no applicable presumptions under Maryland law.

It may be that Judge Hastie was unable to follow Judge Smith in his single-handed repudiation of a consistent line of decisions by the various federal courts of appeal uniformly holding that a technician caretaker in a non-activated State National Guard unit is a federal employee within the meaning of the FTCA. Judge Smith frankly conceded he was in conflict with these decisions, viz., *United States* v. *Holly,* 192 F. 2d 221 (10th Cir. 1951); *Elmo* v. *United States,* 197 F. 2d 230 (5th Cir. 1952); *Courtney* v. *United States,* 230 F. 2d 112 (2d Cir. 1956); *United States* v. *Wendt,* 242 F. 2d 854 (9th Cir. 1957) and the *Meyer* decision. (Appendix hereto p. 10a).

As was pointed out by Judge Staley in his dissenting opinion:

> "On this, the vital question in this case, the majority candidly admits that each and every one of the reported cases is arrayed against it, for each of them holds that when acting in this capacity such a caretaker is an 'employee of the Government' within the meaning of the Federal Tort Claims Act. See the cases cited in the majority opinion."

In the prior companion *Meyer* cases the Court of Appeals for the District of Columbia expressly approved and followed the *Holly* line of caretaker cases. There the court ruled:

> "We hold with the District Court that in his civilian capacity as a caretaker of property of the United States Captain McCoy when on this flight, which entailed the performance of his caretaker and maintenance duties, was an employee of the United States within the terms of the Federal Tort Claims Act. See *United States* v. *Holly*, 192 F. 2d 221 (10th Cir. 1951); *Elmo* v. *United States*, 197 F. 2d 230 (5th Cir. 1952); *United States* v. *Duncan*, 197 F. 2d 233 (5th Cir. 1952); *Courtney* v. *United States*, 230 F. 2d 112 (2d Cir. 1956); *United States* v. *Wendt*, 242 F. 2d 854 (9th Cir. 1957). He was so employed to assist the National Guard, but also to assist the United States. In his property maintenance function he was paid, by, *and the ultimate right of control over him was in, the United States.*" * * * "The fact that this caretaker was also an officer of the National Guard with other duties in that respect did not remove him from the federal employee status while he was actually performing the duties incident to that status." (emphasis supplied)

Judge Smith's reasoning rests essentially upon the irrelevant considerations that military members of the Air National Guard not called into active service by the Federal Government are State and not Federal employees. In

order to escape the controlling authorities, and with no support from the concurring Judge, Judge Smith found it necessary to thread his way through an extraneous maze of constitutional and historical considerations, reaching a decision that "is erroneous for the reason that it is premised on the resolution of a question which is not germane to the issue in this case." (Staley, J.).

As was stated by Judge Staley:

> "* * * On this question, historical and constitutional considerations as to the status of members of the National Guard are simply not relevant. For we are concerned with the status of Captain McCoy, not as a member of the National Guard, but as a civilian caretaker or air technician employed under 32 U. S. C. § 709(a) 'to care for material, armament, and equipment of the Air National Guard * * *' which is property of the Federal Government."

Similarly in the *Meyer* case the District of Columbia circuit held:

> "* * * *The functions lodged by the United States in the State Adjutant General did not serve to supplant this right of control in the United States,* though it may be said to have been ancillary thereto. Such supervision as was lodged in the State did not make Captain McCoy an employee of Maryland. A foreman, for example, is not the employer of the one whose work he may in some respects supervise. There is of course a close relationship between the State of Maryland and the United States in the maintenance of federal property allocated to the Maryland National Guard, but this does not tip the balance toward the State on the issue of employment; *for too much begins and remains with the United States* in the case of these caretakers of federal property." (Emphasis supplied)

This unusual rejection by Judge Smith of the long and well-established principle of the "caretaker as federal em-

ployee" in face of the *Meyer* decision, is rendered more anomalous when it is considered that Judge Hastie ignored entirely and Judge Smith regarded as "of no significance" the admissions by Col. Ebaugh and the U. S. Department of Labor that McCoy was working as a civil employee of the United States at the time and *not* as a member of the Maryland National Guard. Judge Hastie, in by-passing the caretaker issue, by-passed (together with Judge Smith) the admissions of the government and the undisputed testimony of both McCoy and Kilkowski, his superior, who authorized the flight, that at the time of the accident McCoy was performing the duties of his civilian employment.

It is respectfully submitted that the admissions (buttressed by uncontradicted facts), that McCoy was acting, at least in part, in his civilian capacity at the time, required the application of the important and unrebutted *respondeat superior* presumption under Maryland law. (*Williams* v. *United States*, 350 U. S. 857; 1955.) This the majority below completely ignored, thereby depriving plaintiffs of substantial rights.

Under Maryland law, there is a presumption that the operator of a vehicle is the agent, servant of the owner thereof. The presumption is rebuttable. *Keitz* v. *National Paving & Contract Company*, 214 Md. 479, 490; 134 A. 2d 296. Under the law of Maryland, it is also presumed that the agent, servant or employee of the owner of the vehicle was operating the vehicle within the scope of his employment. The presumption may also be rebutted. *Brown* v. *Bendix Aviation Corporation*, 187 Md. 618, 621, 622, 51 A. 2d 292 (1947); *Erdman* v. *Horkheimer*, 169 Md. 204, 206, 207, 181 A. 221 (1935). The Court also overlooked the fact that under Maryland law McCoy could be acting at the same time for two employers (*Keitz, supra*).

II. The Court of Appeals below has rendered a decision in conflict with the decisions of the Courts of Appeals of five different Circuits on the same Federal question.

On the pivotal point of whether the unit-caretaker, McCoy, was a civilian employee of the United States, Judge Smith's Opinion becomes the first and only decision of a Court of Appeals to counter the caretaker decisions from *Holly* to *Meyer*. It also in effect overruled the third circuit's own decision in *O'Toole v. United States*, 206 F. 2d 912, 916 (1953) which had specifically approved the rationale of the *Holly* line of cases.

As Judge Staley observed, the effect of the instant decision is "to thwart the remedial purposes for which that statute (FTCA) was enacted." It should be noted that the Government through the Deputy Attorney General, had taken the position in a Senate bill hearing, that it was unnecessary to amend the FTCA to cover "civilian caretaker technicians" since the Government has been held responsible for their torts "in an unbroken series of court decisions" (*Meyer* opinion, Note 4).

III. The Court of Appeals below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's powers of supervision.

Judge Smith's opinion concluded that, even assuming McCoy in his civilian capacity was an employee of the United States, nevertheless he was not acting within the scope of his employment at the time of the accident. "The plain answer to this conclusion is, as the government concedes in its brief, that it is contradicted by the undisputed testimony of both Captain McCoy and his commanding officer" (Staley, *J.* in *Meyer*). Another answer is that six Federal Judges found otherwise, (District Court Judges Mathews and Gourley; Court of Appeals Judges Fahey,

Danaher, Burger and Staley; Judge Holtzhoff had declined to reexamine this issue.)

The majority below took the unusual step of making a new finding of fact that Captain McCoy was acting solely in his military capacity as an officer of the Maryland Air National Guard and not in his civilian capacity. In setting aside the finding of the trial court on that issue of fact, Judge Smith took the position that he was not bound by Rule 52(a), Federal Rules of Civil Procedure, which provides that findings of fact of the trial court:

> "* * * shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

The findings of fact of the trial court ordinarily will not be disturbed unless clearly erroneous or unless the court finds "on the entire evidence" that it is "left with the definite conviction that a mistake has been committed." *Summerbell* v. *Elgin Nat. Watch Co.*, 94 App. D. C. 220, 215 F. 2d 323 (1954) at p. 221; *Klimkiewicz* v. *Westminster Deposit and Trust Co.*, 74 App. D. C. 333, 122 F. 2d 957 (1941); *Schilling* v. *Schwitzer-Cummins Co.*, 79 App. D. C. 20, 142 F. 2d 82 (1944) at p. 22; *International Boxing Club* v. *United States*, 358 U. S. 242, 252; *United States* v. *United Steelworkers of America*, 271 F. 2d 676, aff'd 361 U. S. 39.

However, the Third Circuit held that Rule 52 (a) was not "applicable on the present appeal" because the actions in the Third Circuit were submitted to the trial court on the record which had been made in the related cases, in the District of Columbia, and the reviewing court was therefore:

> "* * * in as good a position as was the trial court to evaluate the evidence, draw the inferences of which the evidence is reasonably susceptible, and decide the critical questions raised on this appeal."

In fact, the United States District Court for the District of Columbia was in the best position to evaluate the testi-

mony of the witnesses because it was in that Court that the witnesses had appeared and testified.

Judges Smith and Hastie then erroneously grasped at the use of a flight authorization form (Pl. Ex. Vol. I, p. 209) which contained the generalized words "flying proficiency". They chose to overlook the uncontradicted testimony that this broad general term included the *proficiency of the aircraft* and its operation by a civil maintenance technician-pilot in the course of his duties as such, which was a purpose of the subject flight; that this was not a training flight and that McCoy had already logged his required military flight time and was only being paid as a civil employee at the time of the occurrence. (McCoy—Pl. Exh. Vol. I, pp. 70, 71, 80, 120, 124, Vol. II, pp. 493, 494; Kilkowski—Pl. Exh. Vol. I, pp. 136, 138, 140, 146, Vol. III, pp. 587, 605, 606, 616; Gen. Wilson—Pl. Exh. Vol. I, pp. 58, 59, 306). It is respectfully submitted that the substitution of its own finding of fact by a split Appellate Court contrary to the findings below, the uncontradicted evidence, the presumptions under Maryland Law and the admissions of the defendant, in a tenous ground upon which to rest an otherwise unsupported reversal which flies in the face of well-established decisions.

IV. The Court below has decided an important question of federal law which has not been but should be passed upon by this Court.

The court below has reached a conclusion that has the effect of one court of appeals (*Levin*) denying liability on the part of the government for one set of claimants (Viscount passengers' survivors) and another court of appeals (*Meyer*) finding liability on the part of the government for another set of claimants (Viscount pilots' survivors) even though the claims arise out of exactly the same set of facts.

There are three other suits against the United States for wrongful deaths of Viscount passengers arising out of this collision which are awaiting trial. All of these are pend-

ing in different circuits and each of said circuits are different from the Third Circuit and the District of Columbia Circuit. Further confusion and conflict may well be engendered. The Solicitor General has stated in his petition for rehearing of his application for a writ of certiorari in the companion *Meyer* cases that "the United States will not oppose (this) petition". It is apparent that the respondent, United States, appreciates that a situation has been created herein which should be reviewed by this court.

V. *The Doctrine of Collateral Estoppel is applicable.*

It may well be considered by this Court as applicable against the government here. In the *Meyer* companion cases, judgment on the common issue of liability became final when this Court denied certiorari on December 16, 1963.

It is respectfully submitted that the government became collaterally estopped on the issue of liability by the final judgment in the *Meyer* cases several months before the decision of the court below on April 1, 1964. In *United States of America* v. *Willard Tablet Co.*, 141 F. 2d 141, 144 (C. A. 7, 1944) the court said: "The doctrine of res adjudicata is not dependent upon mutuality of estoppel by Judgment, as contended by the government.". See also *Coca-Cola Co.* v. *Pepsi-Cola Co.*, 172 A. 260, 36 Del. 120 (1934); 30A Am. Jur. Sec. 393, p. 444; *The City of Lincoln*, 25 Fed. 835, 843 (S. D. N. Y. 1885).

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

August, 1964.

THEODORE E. WOLCOTT,
Attorney for Petitioners.

Decision of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 14,041 and 14,042

STATE OF MARYLAND for the use of
NADINE Y. LEVIN, et al.,
Plaintiff-Appellees,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant,

STATE OF MARYLAND for the use of
SYDNEY L. JOHNS, et al.,
Plaintiff-Appellees,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant.

APPEAL FROM JUDGMENTS OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued May 21, 1963

Before: STALEY, HASTIE and SMITH, *Circuit Judges.*

OPINION OF THE COURT

(Filed April 1, 1964)

By SMITH, *Circuit Judge.*

These appeals are from judgments in favor of the use plaintiffs in actions for wrongful death brought under

the Federal Tort Claims Act, 28 U. S. C. §§ 1346(b), 2671 and 2674. The deaths resulted from a mid-air collision between a commercial airliner owned by Capital Airlines, in which the decedents were passengers, and a jet trainer plane owned by the defendant and allocated to the Maryland Air National Guard pursuant to § 702(a), 32 U. S. C., and the regulations promulgated thereunder; the collision occurred within the territorial limits of Maryland. The federally owned plane was piloted by one Captain Julius R. McCoy, a rated pilot and a commissioned officer of the Air Guard, employed full time in civilian status as a maintenance technician holding the classified position of Aircraft Maintenance Chief. At the time of the accident the Maryland Air National Guard was not in the active service of the United States.

The trial court found that the sole proximate cause of the accident was "the negligence and wrongful conduct" of the pilot of the federally owned plane. This finding is not challenged here. The trial court also found that at the time of the accident the pilot was acting in his capacity as an "air technician," and, as such, "was a civil employee of the United States acting within the scope of his employment." This finding, on which the respondeat superior liability of the defendant was predicated, is challenged as clearly erroneous and legally unsupportable. We find it necessary to dispose of two preliminary questions before entering upon a consideration of the principal issues raised by these appeals.

PRELIMINARY QUESTIONS.

The plaintiffs argue that under rule 52(a) Fed. Rules Civ. Proc., 28 U. S. C. A., the trial court's findings of fact may "not be set aside unless clearly erroneous." We do not agree that the "clearly erroneous" test is applicable on the present appeal. The actions were submitted to the

trial court on the record made in the consolidated trial of related cases tried in the United States District Court for the District of Columbia. This record consisted primarily, although not entirely, of depositions and written exhibits as to which there was no dispute.

It has been held by this Court, and others, that under such circumstances the findings of fact are reviewable on appeal and need not be given the weight usually accorded them under the rule. *Surgical Supply Service, Inc.* v. *Adler,* 321 F. 2d 536, 539 (3rd Cir. 1963); *Mayo* v. *Pioneer Bank & Trust Company,* 297 F. 2d 392, 395 (5th Cir. 1961); *Merchants National Bank and Trust Co.* v. *United States,* 246 F. 2d 410, 417 (7th Cir. 1957), cert. den. 355 U. S. 881 (1957), reh. den. 355 U. S. 920 (1958); *Lang* v. *First Nat. Bank of Houston,* 215 F. 2d 118, 120 (5th Cir. 1954); *In Re Kellet Aircraft Corp.,* 186 F. 2d 197, 200 (3rd Cir. 1950); *Orvis* v. *Higgins,* 180 F. 2d 537, 539, 540 (2d Cir. 1950), cert. den. 340 U. S. 810 (1950). We are in as good a position as was the trial court to evaluate the evidence, draw the inferences of which the evidence is reasonably susceptible, and decide the critical questions raised on this appeal.

We note further that the consolidated trial of the related actions resulted in judgments favorable to the plaintiffs therein concerned. These judgments, one of which was reversed only on the issue of damages, were affirmed on appeal to the United States Court of Appeals for the District of Columbia. *United States* v. *State of Maryland,* 322 F. 2d 1009 (1963). A petition for a writ of certiorari was denied on December 16, 1963, 32 U. S. L. Week 3220. This denial "imports no expression of opinion upon the merits" of the cases involved, *United States* v. *Carver,* 260 U. S. 482, 490 (1923); *House* v. *Mayo,* 324 U. S. 42, 48 (1945); *Sunal* v. *Large,* 332 U. S. 174, 181 (1947), and is therefore of no significance in the instant appeals.

Decision of Court of Appeals

FIRST QUESTION.

The Federal Tort Claims Act imposes liability upon the United States for personal injury or death caused by the negligence or wrongful act or omission of "any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U. S C. 1346(b). The term "employee of the government," as defined by statute, "includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, ..." 28 U. S. C. 2671.

The first and most important question for decision is whether the relationship between the United States and Captain McCoy, in his civilian position as an air technician, was that of employer and employee within the meaning of the statute. The determination of the question requires consideration of the historical origin of the National Guard and the constitutional and statutory provisions under which it is organized, maintained, disciplined and regulated in its peacetime status.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The respective powers of the federal and state governments with relation to the militia forces are defined by Article 1, § 8 of the Constitution, which provides, in pertinent parts, as follows:

> "The Congress shall have Power . . ., to . . . provide for the common Defence and general Welfare of the United States;

"To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

"To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

. . .; and

"To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

These provisions established a division of mutually exclusive powers. There was vested in Congress the limited power to enact laws necessary to the effective organization of the militia forces which were deemed necessary to the common defense. There was reserved to the states the right to organize, maintain and regulate such forces and to appoint and commission their officers, a right which existed in and was exercised by the states prior to the adoption of the Constitution. *Selective Draft Law Cases*, 245 U. S. 366, 383 (1918). The quoted clauses made it manifest that the militia units were to remain subject to the control and authority of their respective states until called into the active service of the United States for the special purposes authorized.

The militia forces of the several states are, and, since 1903, have been organized and maintained as units of the National Guard[1] under joint federal-state auspices.

[1] The organized militia units of the several States and Territories were officially designated as the National Guard, a designation used by many of the states prior to the Dick Act.

Act of January 21, 1903, 32 Stat. 775, commonly known as the Dick Act. However, the first comprehensive exercise of the Congressional power was the enactment of the National Defense Act of 1916, 39 Stat. 166, and the amendments contained in the Act of June 4, 1920, 41 Stat. 759.

The cited legislation provided for the reorganization of the Army of the United States, and, as an incident thereto, the organization and training of the National Guard units of the various states on a basis conforming to that of the Regular Army. However, it should be emphasized that both acts specifically declared that the organized Guard was to be a component of the Army of the United States only "while in the service of the United States." There was in each of the acts a specific recognition by Congress of the constitutional limitations on its power. This legislation did not alter the status of the National Guard units as independent military forces subject to the exclusive jurisdiction of the several states, except when mustered into the active service of the United States.

The enactments of 1916 and 1920 authorized the appropriation of funds for the support of the National Guard and the apportionment thereof among the states and territories whose organized units met the standards prescribed by the enactments and the regulations promulgated thereunder by the Secretary of War, a condition precedent to federal recognition. While Congress assumed full responsibility for the financial support of the National Guard units which qualified for federal recognition, it specifically recognized the constitutional authority of the several states and territories to organize, maintain and discipline their respective units under local law.

The statutes also authorize the procurement, at federal expense, of arms, equipment and material, and the issue thereof to the National Guards of the several states and territories upon requisition of their respective gov-

ernors. As a condition precedent to the allocation of such property, the states were required to make adequate provision for its maintenance and protection. The relevant sections of the Act, and the amendments thereto, provided that the arms, equipment and material issue were to remain the property of the United States and, further, that the states would be held liable for the loss, damage or the destruction of property due to carelessness or neglect. It is clear that under the statutory plan the possession and control of the allocated property, as well as the responsibility for its care and maintenance in accordance with prescribed standards, were to be committed to the states.

The Acts of 1916 and 1920 were further amended by the Act of June 15, 1933, 48 Stat. 153. The only amendment here relevant (Section 5) established the "National Guard of the United States" as a "reserve component of the Army of the United States," consisting of the "federally recognized National Guard units" of the states. However, the statute did not alter the status of the Guard units or their relationship to the federal government. The amendment specifically provided that "the members of the National Guard of the United States *shall not be in the Active Service of the United States* except when ordered thereto in accordance with law, and, in time of peace, *They Shall be Administered, Armed, Uniformed, Equipped, and Trained in Their Status as the National Guard of the Several States. . . .*" (Emphasis supplied).

The laws relating to the military forces, including the National Guard, were revised and codified by the Act of August 10, 1956, entitled "An Act to revise, codify, and enact into law, title 10 of the United States Code, entitled 'Armed Forces', and title 32 of the United States Code, entitled 'National Guard'." 70A Stat. 1. This initial codification was restricted to the statutes which had become effective prior to March 31, 1955. The statutes which

became effective thereafter were incorporated into the codification by the Act of September 2, 1958, 72 Stat. 1437. The purposes of the codification were to restate and clarify the existing laws and to eliminate earlier provisions which had become obsolete, particularly those contained in the Acts of 1916 and 1920. The substance of the laws was not changed.

The codification defined, as did the earlier legislation, a division of powers consonant with Article 1, § 8 of the Constitution, supra. There was reserved to the states the authority to organize, discipline, train and regulate their National Guard units, as theretofore, but in accordance with standards of training and discipline prescribed by the acts of Congress and the regulations promulgated thereunder by either the Secretary of the Army or Secretary of the Air Force. It is clear from the legislation that compliance with these standards was a condition precedent to the right of the states to federal recognition and subsidization.

DISCUSSION.

At all times therein relevant, the pilot of the federally owned plane, Captain McCoy, held a dual status. He was a commissioned officer of the Maryland Air National Guard under appointment by the Governor. *Maryland Code*, Article 65, § 70. As a duly appointed and commissioned officer, he had qualified for federal recognition, pursuant to §§ 305 and 307 of Title 32 U. S. C., and the pertinent regulations, and by reason thereof his military earnings were paid directly from federal funds. We should add that in his military status Captain McCoy was the "aircraft squadron maintenance officer," a position comparable to the one he held in his civilian capacity.

In his civilian status Captain McCoy was a full-time maintenance technician employed by the Adjutant General

of the Maryland National Guard, the person designated by the Secretary of the Air Force as the one authorized to employ civilian personnel. 32 U. S. C. § 709(f). He held the position of Aircraft Maintenance Chief and, as such, was responsible for the civilian employees in the Aircraft Maintenance Section [2] and the care, inspection and repair of aircraft and equipment. *Air National Guard Manual* (ANGM 40-01), p. 107. On the day of the accident he was "Acting Maintenance Supervisor" and, as such, was responsible for the operation of the Maintenance Division under the general supervision of Lt. Col. Kilkowski, a commissioned officer of the Guard who in civilian status held the position of Base Detachment Commander. *Air National Guard Manual* (ANGM 40-01), pp. 105 and 106. His civilian salary, like his military salary, was paid directly from federal funds pursuant to statutory authorization.

It was on the basis of the facts summarized in the foregoing paragraph that the court below held that Captain McCoy in his civilian status was an employee of the United States within the meaning of the Federal Tort Claims Act, supra. There is support for his holding in the cases hereinafter considered and upon which the appellees rely.

The appellate courts have uniformly held that the federally recognized members of National Guard units not in active federal service are not employees of the United States within the meaning of the said Act. It has been held that they are employees of their respective states. *Williams* v. *United States,* 189 F. 2d 607 (10th Cir. 1951); *Dover* v. *United States,* 192 F. 2d 431 (5th Cir. 1951); *McCranie* v. *United States,* 199 F. 2d 581 (5th Cir. 1952), cert. den. 345 U. S. 922; *Storer Broadcasting Company* v. *United States,* 251 F. 2d 268 (5th Cir. 1958), cert. den. 356 U. S. 951; *Pattno* v. *United States,* 311 F. 2d 604

[2] A section within the Maintenance Division which was under the supervision of the Base Detachment Commander.

(10th Cir. 1962), cert. den. 373 U. S. 911. But see *O'Toole* v. *United States*, 206 F. 2d 912 (3rd Cir. 1953).[3] We should emphasize that in each of the cited cases the Court regarded as of no significance the following facts: the Guard member had qualified for federal recognition, was compensated directly from federal funds, and was in possession and control of a federally owned vehicle involved in the accident which gave rise to claims for personal injury.

These appellate courts have held, also uniformly, that enlisted members of the National Guard, employed in civilian status as maintenance technicians pursuant to federal regulations, are employees of the United States within the meaning of the said Act. *United States* v. *Holly*, 192 F. 2d 211 (10th Cir. 1951); *Elmo* v. *United States*, 197 F. 2d 230 (5th Cir. 1952); *United States* v. *Duncan*, 197 F. 2d 233 (5th Cir. 1952); *Courtney* v. *United States*, 230 F. 2d 112 (2nd Cir. 1956);[4] *United States* v. *State of Maryland*, *supra*. We emphasize that in each of these cases the Court regarded as significant, and somewhat determinative, the following facts: the maintenance technician qualified for employment under federal regulations, was paid directly from federal funds, and was responsible for the repair and maintenance of federally owned equipment in accordance with prescribed regulations. The courts held that by reason of the regulations under which the maintenance technician was employed and compensated, performed his duties, and was responsible for the maintenance of federally owned property, he was under the direction and control of the United States and therefore its employee.

It is difficult for us to perceive how factors may be considered immaterial in one situation and material in another which is comparable. We are of the view that the

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[3] It was held that members of the National Guard of the District of Columbia were federal employees.

[4] But see dissenting opinion of Chief Judge Lumbard.

rationale upon which the distinction has been held to rest is untenable for the reasons hereinafter discussed.

The Maryland Air National Guard, although federally recognized, was an independent military force of the State under the command jurisdiction of the Governor as "Commander-in-Chief of the land and naval forces of the State." *Maryland Constitution, Article I*, § 8, *Maryland Code*, supra, § 6. The Governor was empowered to make such rules and regulations as were necessary to the appropriate "organization, discipline, training and equipment" of the Guard in conformity with "the National Defense Act,[5] the amendments thereto,[6] and regulations made in pursuance thereof." Ibid. The Air Guard was under the immediate command of an Adjutant General "appointed by the Governor by and with the advice and consent of the [State] Senate." *Maryland Code*, supra §§ 6, 9 and 10; 32 U. S. C. § 314(a). The Military Department of the State was under the control of a ranking line officer on "active duty status" who, as Quarter Master General, was responsible "for the care, preservation and safekeeping of all military property," including that allocated to the Air Guard by the federal government. *Maryland Code*, supra, §§ 10 and 11.

The federally owned jet trainer involved in the collision had been purchased for and allocated to the Maryland unit pursuant to § 702 of Title 32 U. S. C., the pertinent provisions of which read as follows:

> "(a) Under such regulations as the President may prescribe, . . . the Secretary of the Air Force may buy . . . and, upon requisition of the governor of any State . . . issue to its . . . Air National Guard, . . .

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[5] Act of August 10, 1956, supra.

[6] Act of September 2, 1958, supra.

> the supplies necessary to uniform, arm, and equip that . . . Air National Guard for field duty.
>
> "(d) No property may be issued to the National Guard of a State . . . unless that jurisdiction makes provision, satisfactory to the Secretary concerned, for its protection and care."

While the plane remained the property of the United States, 32 U. S. C. § 710(a), it was committed to the possession and control of the Maryland Guard for its exclusive use.

The plane was loaned to the State of Maryland under statutory terms and conditions which were essentially contractual. The State was granted exclusive possession and control of the craft on condition that it assume full responsibility for its care and maintenance, in accordance with federally prescribed standards, and liability for any loss or damage occasioned by negligence. 32 U. S. C. § 710(c). These conditions were limited to those which were essential to insure the care and protection of property purchased with federal funds. The State could be relieved of its accountability only under the conditions prescribed by statute, 32 U. S. C. §§ 704, 710 and 711.

The employment of Captain McCoy as a maintenance technician was pursuant to the pertinent provisions of § 709(a) and (f) of Title 32 U. S. C., which read as follows:

> "(a) . . . Under such regulations as the Secretary of the Air Force may prescribe, funds allotted by him for the Air National Guard may be spent for the compensation of competent persons to care for material, armament, and equipment of the Air National Guard. . . .

> "(f) The Secretary concerned shall fix the salaries of clerks and caretakers authorized to be employed under this section, and shall designate the person to employ them."

These provisions vested in the Secretary of the Air Force the right to spend federal funds for the employment and "compensation of competent persons", and the authority to designate the person by whom they were to be employed. There was no other right or authority vested in the Secretary. The statute merely authorized compensation of state employed caretakers from federal funds, an authorization consistent with subsidization.

The person designated by the Secretary, pursuant to subdivision (f), supra, was the Adjutant General of the Maryland National Guard. He was authorized by appropriate regulation "to employ, fix rates of pay, establish work hours (a minimum of 40 hours per week) supervise, and discharge employees within the purview of [the] regulation; subject to the provisions of law and such instructions as may be subsequently issued by the Chief, National Guard Bureau." *Air National Guard Regulations* (ANGR 40-01). The enumerated functions were exercised by the Adjutant General as the duly appointed representative of the State of Maryland; he was responsible only to the Governor. The right to employ maintenance technicians and other personnel and, as an incident thereto, supervise their work and the manner of its performance, was vested in the Adjutant General, as the representative of the State of Maryland. See *Harris* v. *Boreham*, 233 F. 2d 110 (3rd Cir. 1956).

The United States Court of Appeals for the District of Columbia Circuit concluded in the companion case, *United States* v. *State of Maryland, supra*, p. 1012, that Captain McCoy "in his civilian capacity as a caretaker of property of the United States" was an employee of the United States within "the terms of the Federal Tort Claims

Act." The conclusion appears to be predicated on the same rationale as the earlier cases; in fact, the earlier cases are cited in support of it.

The Court stated, at page 1013:

> "In his property maintenance function he was paid by, and the ultimate right of control over him was in, the United States. The functions lodged by the United States in the State Adjutant General did not serve to supplant this right of control in the United States, though it may be said to have been ancillary thereto. Such supervision as was lodged in the State did not make Captain McCoy an employee of Maryland. . . . There is of course a close relationship between the State of Maryland and the United States in the maintenance of federal property allocated to the Maryland National Guard, but this does not tip the balance toward the State on the issue of employment; for too much begins and remains with the United States in the case of these caretakers of federal property."

We cannot agree with either the conclusion or the tenuous premise upon which it rests.

We have here a classic situation, of which there are many examples,[7] in which the Congress has undertaken the financial support of a state activity in the national interest, on condition that the activity conform to the congressional enactments and the regulations promulgated thereunder. The Congress, consistent with the limited

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7 The Federal Aid Highway Act of 1958, 23 U. S. C. 101, et seq., under which Congress authorized the expenditure of federal funds and the apportionment thereof among the several states which assumed responsibility for the construction of highways as part of an interstate system of roads; the Hill-Burton Act and the amendments thereto, 42 U. S. C. 291, et seq., which authorized the appropriation of federal funds and the apportionment thereof among the several states, for the construction of hospitals and similar facilities.

power vested in it by Article I, § 8 of the Constitution, supra, has undertaken to subsidize the National Guard units of the respective states, on condition that they be organized, maintained, disciplined and equipped in accordance with federally prescribed standards.

It is evident that the only purposes of the pertinent statutes, and the regulations promulgated thereunder, were to insure the effective organization of the National Guard and to protect federal funds against unrestricted expenditure, both in the national interest. There is nothing in the legislation which would indicate that it was the intent of Congress to either interfere with the right of the states to organize the Guard or deprive the states of the right to employ, supervise and control such civilian personnel as were deemed essential to the support of the Guard. We are of the view that in their relationships to the United States there is no distinction between a federally recognized member of the Guard and a federally recognized maintenance technician employed in his civilian capacity. A member of the Guard may qualify for federal recognition and compensation from federal funds only if he meets the standards prescribed by federal regulation; a maintenance technician may qualify for employment and compensation from federal funds only if he likewise meets the standards prescribed by federal regulation.

We are of the opinion, and so hold, that at the time of the accident Captain McCoy, in his capacity as maintenance technician, was an employee of the State of Maryland subject to the supervision and control of the Base Detachment Commander, who was in turn under the supervision and control of the Adjutant General. Captain McCoy was not a federal employee within the meaning of the Federal Tort Claims Act, supra.

SECOND QUESTION

However, even if we assume that Captain McCoy, in his civilian capacity, was an employee of the United States, there remains a further question for decision. Was he acting within the scope of his employment as a maintenance technician at the time of the accident? Otherwise stated, was the activity in which he was engaged related to his employment as a maintenance technician and in furtherance of an interest of his alleged employer? The question must be decided under the law of Maryland, the place of the tortious conduct. 28 U. S. C. § 1346(b); *Richards* v. *United States*, 369 U. S. 1 (1962); *Pattno* v. *United States*, supra. The ultimate test is the relation or nonrelation of the tortious conduct to his work as a civilian employee. If Captain McCoy's activity at the time of the accident was within his line of duty as a member of the Guard, the United States cannot be held liable under the Federal Tort Claims Act. See the cases hereinabove cited.

It is the law of Maryland that an employer may be held liable in damages for personal injury or death caused by the tortious conduct of his employee only if, at the time of the accident, the employee was engaged in an activity in connection with the purposes of his employment and in furtherance of objects within his line of duty. *Lewis* v. *Accelerated Transport-Pony Express, Inc.*, 148 A. 2d 783 (1959); *Gloge Indemnity Company* v. *Victill Corporation*, 119 A. 2d 423, 427 (1956); *Eyerly* v. *Baker*, 178 A. 691, 696 (1935). The decisive test of the employer-employee relationship, essential to the creation of liability, is the right of the employer to direct and control the employee at the time and in respect to the very occurrence out of which the accident arose. *Greer Lines Company* v. *Roberts*, 139 A. 2d 235, 239 (1958); *Gallaghers Estate* v. *Battle*, 122 A. 2d 93, 98 (1956); *Henkelmann* v. *Metropolitan*

Life Ins. Co., 26 A. 2d 418, 423 (1942). The test is particularly applicable in the instant case.

In his military capacity Captain McCoy was a rated aeronautical officer assigned to the 104th Fighter-Interceptor Squadron of the Maryland Air National Guard. He was a qualified aviator and, as such, was permitted to fly federally owned aircraft when authorized to do so by the Base Detachment Commander. To maintain his level of efficiency and, incidentally, to retain his flying status, Captain McCoy was required by regulation to participate in the prescribed training programs and, in connection therewith, spend a minimum number of hours per year in aerial flight.[8]

These flights were designated as "proficiency flights," as distinguished from "functional check flights" which as the term indicates, had a different purpose. The proficiency flights had for their prime purpose training to improve flying skills. The training programs were under the control, supervision and command jurisdiction of the officers of the Maryland Air National Guard, subject only to the requirement that the programs conform to the standards prescribed by the Air National Guard Bureau. 32 U. S. C. § 501; *Air National Guard Regulation* No. 50-01.

In his military capacity Captain McCoy also held the position of "aircraft squadron maintenance officer." The duties and responsibilities of this post were somewhat similar to those of the maintenance technician. They were carried out under the command jurisdiction of Colonel Kilkowski, as squadron commander, a military post. Captain McCoy testified, as did Colonel Kilkowski, that on every flight the "squadron maintenance officer" would

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[8] The regulations fixed the minimum and maximum number of flight hours. When the maximum number of hours had been accumulated, a flying officer was no longer eligible for flight pay. Captain McCoy was in this situation at the time of the accident. However, the accumulation of additional hours was relevant to the officer's rating.

evaluate the performance of the aircraft and report thereon to the appropriate officer. This was admittedly normal procedure even though the flight was one for the "purpose of maintaining flying proficiency."

The accident occurred on Tuesday, May 20, 1958, a day on which Captain McCoy was employed in his civilian capacity. He reported for work at the usual hour and, before taking off on the fateful flight, performed certain administrative duties related to his civilian employment.[9] However, pursuant to arrangements previously made, Colonel Kilkowski authorized Captain McCoy to make a "proficiency flight." The written Flight Order specifically designated the flight as one "for purpose of maintaining flying proficiency." Captain McCoy also had permission to carry a passenger, a member of the Army Reserve who was interested in joining the Air Guard. It appears from the undisputed testimony that the flight was not a "functional check flight," which is one made in connection with aircraft maintenance, and requires a minimum crew of two qualified men.

At the time of the accident Captain McCoy was engaged in a training flight which was under the control and supervision of the authorized military personnel of the Maryland Air National Guard. He was not acting within the scope of his employment as a maintenance technician but was acting within his line of duty as a commissioned aeronautical officer of the Guard. The fact that he was not eligible for flight pay and was retained in the civilian payroll status is of no relevance.[10] It is similarly of no rele-

[9] On the day in question, Captain McCoy was carried in civilian pay status. He had accumulated the maximum hours of flight time for the period and could not qualify for flight pay.

[10] The accumulation of the maximum number of flight hours was not a bar to additional proficiency flights; in fact, it appears from the testimony that the number of hours spent in aerial flight was a factor in the evaluation of a pilot's proficiency and, consequently, his rating.

vance that in accordance with normal flight procedure he checked the performance of the aircraft and reported thereon. This was his responsibility as "squadron maintenance officer," a military post.

After the accident Captain McCoy, having sustained injury, filed a written notice of claim for the benefits allowable under the Federal Employees' Compensation Act, 5 U. S. C. § 751. This claim was supported by the certificate of Lt. Col. Ebaugh, United States Property Fiscal Officer for the State of Maryland. The certificate stated that Captain McCoy was working "as a Civil Employee of the United States at the time of injury and not as a member of the Maryland National Guard." The claim was approved by the Department of Labor and the benefits allowable under the Act were paid. Whether the claim was properly or improperly approved we need not decide.

The appellees here argue that the certification, coupled with the subsequent approval of a claim for payment, was tantamount to a binding admission that Captain McCoy was a civil employee of the United States at the time of the accident. The argument is untenable for two reasons. An admission such as that made by Lt. Col. Ebaugh, unlike a judicial admission, is in no sense final and conclusive so as to bind the party on whose behalf it was purportedly made. *C. H. Elle Construction Co.* v. *Western Casualty & Sur. Co.*, 294 F. 2d 459, 461, 462 (9th Cir. 1961); *State Farm Mut. Auto Ins.* v. *Porter*, 186 F. 2d 834, 842 and 843 (9th Cir. 1950). The acceptance of the claim for compensation, supported as it was by Lt. Col. Ebaugh's statement, is of no significance. The doctrines of res judicata and equitable estoppel do not ordinarily apply to administrative determinations. *Jason* v. *Summerfield*, 214 F. 2d 273 (D. C. Cir. 1954), cert. den. 384 U. S. 840; *Niagara Mohawk Power Corp.* v. *Federal Power Commission*, 202 F. 2d 190 (D. C. Cir. 1952), affd. 347 U. S. 239. This is particularly true where, as here, the adminis-

trative determination is subject to review at any time by the agency which made it. 5 U. S. C. §§ 787 and 788.

The judgments of the court below will be reversed and the actions remanded with directions that judgments be entered in favor of the defendant.

HASTIE, *Circuit Judge, concurring in result.*

I agree with Judge Smith that the flight during which this accident occurred was not an undertaking of a civilian caretaker in performance of his responsibility for aircraft maintenance. Rather, it was a "proficiency flight", a training activity, properly undertaken by Captain McCoy in his capacity as an officer of the Maryland Air National Guard.

The fact that any incidental observations this pilot might make concerning the performance of his plane would be communicated to and used by civilian technicians in the servicing or maintenance of the plane did not change the basic character of this training flight. Neither, as I see it, did it matter that the officer flying the plane had a second military responsibility as "squadron aircraft maintenance officer" and a separate and distinct civilian job at the airfield as a caretaker and aircraft technician. We all agree that in his capacity as a National Guard officer, whether functioning as a pilot or as the squadron aircraft maintenance officer, Captain McCoy was not a federal employee within the meaning of the Federal Tort Claims Act. I think it is irrelevant that as a civilian caretaker and mechanic he might put to use the information he had acquired during the performance of one or both of his other responsibilities as a National Guard officer.

The considerations and conclusions stated in the foregoing paragraph are a sufficient basis for reversing the judgment of the district court and requiring the dismissal of this action. Therefore, I do not reach the more difficult and far-reaching question, whether a civilian caretaker and

technician, employed as provided in section 709 of Title 32, United States Code, is a federal employee within the meaning of the Tort Claims Act.

I join in the decision reversing the judgment of the district court, but without expressing any opinion upon that portion of the disagreement between my colleagues which concerns the status of civilian aircraft maintenance workers employed to care for federally owned planes while in the custody of National Guard units.

STALEY, *Circuit Judge, dissenting.*

In my judgment the decision of the majority is erroneous for the reason that it is premised on the resolution of a question which is not germane to the issue in this case. The majority reasons that constitutional and historical considerations make it manifest that, for the purposes of the Federal Tort Claims Act, members of the Air National Guard are state and not Federal Employees. Until today that question had been left open in this circuit. *O'Toole* v. *United States*, 206 F. 2d 912 (C. A. 3, 1953). In the Second Circuit, see *Courtney* v. *United States*, 230 F. 2d 112 (C. A. 2, 1956). In my view, the United States maintains such control over members of the National Guard even while they have not been called into active service that they are "employees of the Government" within the meaning of the Federal Tort Claims Act. But I leave that question to another day, for, as the majority states, "The first and most important question for decision is whether the relationship between the United States and Captain McCoy, *in his civilian position as an air technician,* was that of employer and employee within the meaning of the statute." (Emphasis supplied.) On this question, historical and constitutional considerations as to the status of members of the National Guard are simply not relevant. For

we are concerned with the status of Captain McCoy, not as a member of the National Guard, but as a civilian caretaker or air technician employed under 32 U. S. C. § 709(a) "to take care for material, armament, and equipment of the Air National Guard * * * " which is property of the Federal Government.

On this, the vital question in this case, the majority candidly admits that each and every one of the reported cases is arrayed against it, for each of them holds that when acting in this capacity such a caretaker is an "employee of the Government" within the meaning of the Federal Tort Claims Act. See the cases cited in the majority opinion.

The undisputed evidence in this case makes it abundantly clear that in addition to his duties as a member of the Air National Guard, Captain McCoy was employed as a civilian maintenance technician pursuant to 32 U. S. C. § 709. Indeed, the record shows that the major portion of his salary resulted from his employment in this capacity, and that he was so employed on the very day of this tragic accident. Pursuant to § 709(f) his salary was fixed by the Secretary of the Air Force, who had designated the Adjutant General of the Maryland National Guard to employ him. Thus, in this capacity, McCoy was employed under Federal law, received his pay from Federal funds, cared for Federal property, and his duties were fixed by Federal regulation. As the Court of Appeals for the District of Columbia has held with respect to this very individual in companion suits brought by the survivors of others killed in this catastrophe, "In his property maintenance function he was paid by, and the ultimate right of control over him was in, the United States." *United States* v. *State of Maryland, for the Use of Meyer*, 322 F. 2d 1009, 1013 (C. A. D. C.), cert. denied, — U. S. — (1963). For an excellent exposition of these and additional fac-

tors which compel the conclusion that a caretaker is an employee of the Federal Government, see *Elmo* v. *United States*, 197 F. 2d 230 (C. A. 5, 1952), and *United States* v. *Holly*, 192 F. 2d 221 (C. A. 10, 1951). We specifically approved the rationale of *Holly in O'Toole* v. *United States*, 206 F. 2d at 916. Thus, the effect of the majority's decision is to overrule our decision in that case.

The majority finds it difficult to perceive how the incidents of employment I have mentioned are material in considering McCoy's employment status as a civilian caretaker, but are not decisive in determining his employment status as a member of the National Guard. I have no such difficulty. There can be no question but that these indicia of employment represent significant, if not conclusive factors, in determining the employer-employee relationship. See *National Labor Relations Board* v. *Howard Johnson Co.*, 317 F. 2d 1 (C. A. 3, 1963), cert. denied — U. S. — (196). Hence, in ordinary circumstances, members of the National Guard would be considered Federal employees because substantial elements of control over them are vested in the United States. However, because of the constitutional provision with respect to the militia, several cases have held that members of the National Guard who have not been called into active service are state and not Federal employees. See the cases cited in the majority opinion. I have already indicated my disagreement with that conclusion. But, in any event, there is no such constitutional or statutory provision with respect to civilian caretakers. Accordingly, in determining their employment status an analysis of the incidents of employment is of critical significance. As has been previously indicated, such an analysis of McCoy's status as a civilian caretaker of Federal property leads to the ineluctable conclusion that, in this capacity, he was an employee of the United States.

The majority states that as a full time maintenance technician McCoy was "employed by the Adjutant General of the Maryland National Guard." But this observation is not persuasive, for under 32 U. S. C. § 709(f), "the Secretary concerned shall fix the salaries of clerks and caretakers authorized to be employed under this section, and shall designate the person to employ them." Thus in employing McCoy the Adjutant General was merely acting as the designee of the Secretary of the Air Force. As was stated in *United States* v. *State of Maryland, for the Use of Meyer*, 322 F. 2d at 1013:

> "* * * The functions lodged by the United States in the State Adjutant General did not serve to supplant this right of control in the United States, though it may be said to have been ancillary thereto. Such supervision as was lodged in the State did not make Captain McCoy an employee of Maryland. A foreman, for example, is not the employer of the one whose work he may in some respect supervise. There is of course a close relationship between the State of Maryland and the United States in the maintenance of federal property allocated to the Maryland National Guard, but this does not tip the balance toward the State on the issue of employment; for too much begins and remains with the United States in the case of these caretakers of federal property."

In this setting, to hold that McCoy was a state and not a Federal employee for the purposes of the Federal Tort Claims Act is to thwart the remedial purposes for which that statute was enacted.

The majority also concludes that, assuming that Captain McCoy in his civilian capacity was an employee of the United States, he was not acting within the scope

of his employment as a maintenance technician at the time of the accident. The plain answer to this conclusion is, as the Government concedes in its brief, that it is contradicted by the undisputed testimony of both Captain McCoy and his commanding officer. The testimony of the commanding officer who gave permission for the flight in question was given at the trial of the companion case in the District of Columbia. That testimony was made a part of the record in this case by the agreement of the parties.[1] As indicated in the opinion of the Court of Appeals for the District of Columbia, the commanding officer testified as follows:

> "A. The general reason for any flight of this nature is proficiency. You don't set up a flight for the express purpose of taking any individual up, the express purpose for flying is for your own general proficiency. If there is a seat available and the man qualifies in accordance with the regulations, it is permissible to take him up on that flight. The Air Force does it all the time.
>
> "Q. Were there other reasons for the flight in question?
>
> "A. I think as I mentioned before, a third reason for any flight is to insure that the equipment is in

[1] In that portion of its brief describing the proceedings in the district court, the Government relates that:

"The evidence at the trial on that issue consisted of the testimony of Captain McCoy, and his commanding officer, Lt. Col. Kilkowski, and others, and numerous exhibits and depositions, including the deposition of Major General Winston P. Wilson of the Arkansas Air National Guard, who has been on active (Federal) duty in the National Guard Bureau of the Department of Defense as the Assistant Chief for the Air National Guard. Both Captain McCoy and Lt. Col. Kilkowski testified that in their opinions they believed that Captain McCoy was performing duties in his civilian capacity as well as his military capacity, at the time of the accident."

proper working order, to—well, as a result of each flight the maintenance officer takes, he has to fill out a form, whether the aircraft was okay, or whether it had even minor discrepancies which would be listed in the form. When he lands and comes back from the flight, this is done; so there is a third reason for the flight, which is to insure the proper maintenance of the equipment which he has general supervision over.

"Q. As an aircraft technician?

"A. As an aircraft maintenance officer in the squadron and also as an air technician."

United States v. *State of Maryland for the Use of Meyer*, 322 F. 2d at 1012.

The testimony of Captain McCoy is to the same effect. Certainly, in the light of this uncontroverted evidence, I cannot say that the district court erred in concluding that Captain McCoy was acting within the scope of his employment as a maintenance technician at the time of this accident.

I think that no more need be said; I would affirm the judgments of the district court.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Pertinent Provisions of the Federal Tort Claims Act

(Title 28, United States Code):

§ 1346. *United States as defendant.*

"(b) Subject to the provisions of chapter 171 of this title, the district courts, * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

§ 2671. *Definitions.*

As used in this chapter and sections 1346 (b) and 2401 (b) of this title, the term . . .

" . . . 'Employees of the government' includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation."

Plaintiff's Exhibit 15, National Guard Regulations No. 75-16

(Pl. Exh. 634-39)

1. *Authority*: Accounting clerks and caretakers referred to in these regulations are employees authorized under the provision of section 90, National Defense Act, for the administration and care of material, armament, vehicles, and equipment provided for the National Guard and used solely for military purposes. The Secretary of the Army has delegated to the several adjutants general of States, Territories, and the District of Columbia, authority to employ, fix rates of pay, establish duties and work hours (not to exceed 40 hours per week), and to discharge employees within the purview of this regulation; subject to the provisions of law and such instructions as may from time to time be issued by the Chief, National Guard Bureau. (Pl. Exh. 635).

2. *Definitions*: The following definitions are applicable:

b. *Caretakers* (Army) are male, civilian employees authorized as supervisors, mechanics, and technicians. They may be divided into two main categories.

(1) *Unit Caretakers*: Employees who work directly under the supervision of a company or similar unit commander and are responsible to that commander for the care, maintenance, and repair of the unit equipment.

(2) *Pool Maintenance Caretakers*: Employees who work in or from fixed shops, under the direction of shop or pool supervisors and under the general supervision of the State maintenance officer. They are responsible for the inspection, repair, and reconditioning of equipment pertaining to National Guard organizations. (Pl. Exh. 635).

Plaintiff's Exhibit 15, National Guard Regulations No. 75-16

c. *Caretakers* (Air) are male civilian employees authorized by law for maintenance, repair, and inspection of equipment issued to the National Guard Air units.

3. *Number*: The number of accounting clerks and caretakers authorized to be paid from Federal funds in each State will be announced periodically by the Chief, National Guard Bureau. This number will be based on geographic considerations, troop strengths, the amount and types of equipment issued to the State, and upon funds made available for the National Guard. The number of personnel actually paid from Federal funds may exceed the total specified from time to time by the Chief, National Guard Bureau, if employment is on a part-time basis and funds alloted for each job are not exceeded. (Pl. Exh. 636).

4b. *Caretakers (Army)*

(1) *Unit caretakers* must be members of the National Guard and of the unit for which employed. They must be qualified to perform maintenance, at the organization level, on the equipment for which the unit commander will be responsible. Such qualifications will be determined by appropriate aptitude tests. (Pl. Exh. 636).

c. Caretakers (Air) must be members of the National Guard and must be able to perform the duties specified for the particular job in AAF Manual 35-0-1 "Military Personnel, Classification and Duty Assignment," 3 April 1944 (as revised) or WD TM 12-427 "Military Occupational Classification of Enlisted Personnel," 12 July 1944 (as revised). However, they may be trained in additional duties as may be required by the unit commanders. Commissioned officers of the

Plaintiff's Exhibit 15, National Guard Regulations No. 75-16

National Guard Air Units may be employed as caretakers only in the Military Occupational Specialty positions indicated in current chart for Permanent Caretaker Detachment, National Guard Air units. (Pl. Exh. 637).

7d. Payrolls will be certified by the bonded United States property and disbursing officer and approved by the State adjutant general or an officer designated by him. (Pl. Exh. 639).

CHANGE No. 1

NGR 75-16, 29 December, 1947, is changed as follows:

Authority: Accounting clerks and caretakers referred to in these regulations are employees authorized under the provisions of Section 90, National Defense Act, for the administration and care of materiel, armament, vehicles and equipment provided for the National Guard and used solely for military purposes. The Secretary of the Army had delegated to the several adjutants general of States, Territories and the District of Columbia, authority to employ, fix rates of pay, establish duties and work hours, and to discharge employees within the purview of this regulation; subject to the provisions of law and such instructions as may from time to time be issued by the Chief, National Guard Bureau. (Pl. Exh. 646).

Plaintiff's Exhibit 16, National Guard Regulations No. 75-16
(Pl. Exh. 647) (Superseded)

1. *Purpose*: The purpose of these regulations is to outline the qualifications, duties, rights and obligations of the following personnel (hereinafter referred to collectively as "National Guard civilian personnel"): administrative assistants; accounting clerks; maintenance personnel; rangekeepers; and administrative, supply and maintenance technicians, and to prescribe the procedure for the payment of these individuals.

2. *Authority*: National Guard civilian personnel referred to in these regulations are employees authorized under the provisions of Section 90, National Defense Act, for administrative and accounting duties, maintenance repair and inspection of materiel, armament, vehicles and equipment provided for the National Guard and used solely for military purposes. The Secretary of the Army has delegated to the adjutants general of the several States, Territories, Puerto Rico, and the District of Columbia, the authority to employ, fix rates of pay, establish duties and work hours (a minimum of 40 hours per week), supervise and discharge employees within the purview of these regulations; subject to the provisions of law and such instructions as may from time to time be issued by the Chief, National Guard Bureau. (32 U.S.C.A. 42 and 42a; G.O. No. 96, Dept. of the Army, 9 Nov. 51).

3. *Definitions*: a. Administrative assistants are federally recognized officers, warrant officers or enlisted men employed as civilians to act as civilian administrative assistants to commanders in the performance of such duties, responsibilities and administrative matters for which the commanders are responsible, or may be required to perform (Pl. Exh. 648-649).

Plaintiff's Exhibit 17, ANGR 40-01

SECTION I—*General.*

1. *Purpose:* This Regulation provides a manning guide for the Air National Guard civilian personnel program and establishes policies and procedures applicable to Air National Guard civilian personnel. (Pl. Exh. 656).

2. *Policy:* a. Air National Guard civilian personnel shall be utilized to effect maximum efficiency in administration, supply, operations, training, and maintenance of the Air National Guard.

b. Air National Guard civilian personnel must be federally recognized members of the Air National Guard of the State, Territory, Puerto Rico, or the District of Columbia except for the employment of:

(1) Females (when specifically authorized by the Chief, National Guard Bureau).

(2) Temporary personnel paid from funds other than those designated for the pay of air technicians.

e. Airmen type air technician positions may be transferred to other units or organizations, or the position may be changed to another authorized position at the discretion of the State adjutant general, except that such positions may not be transferred to or from Headquarters, State Air National Guard without prior approval of the Chief, National Guard Bureau.

f. Officer type air technicians positions may not be transferred or changed without prior approval of the Chief, National Guard Bureau. (Pl. Exh. 657)

h. Air National Guard civilian personnel may not accept outside employment which interferes or conflicts with

the performance of their Air National Guard civilian duties.

k. Officers required to meet a Federal recognition board should not be employed prior to receipt of Federal recognition, and any individual if so employed accepts such employment at his own risk. Officers exempted from meeting a Federal recognition board may be employed and paid from the date the individual is appointed. Airmen may be employed upon completion of the oaths of enlistment.

1. The authority governing matters pertaining to Air National Guard civilian personnel is contained in this regulation and will be quoted as reference in special orders and other official action.

3. *Authority*

a. Basic authority for the employment of Air National Guard civilian personnel is contained in Section 90, National Defense Act, as amended.

b. Authority is delegated to the adjutants general of the several States, Territories, Puerto Rico, and the District of Columbia, to employ, fix rates of pay, establish work hours (a minimum of 40 hours per week) supervise and discharge employees within the purview of this regulation; subject to the provisions of law and such instructions as may be subsequently issued by the Chief, National Guard Bureau. (Pl. Exh. 658)

5. *Definitions*: For the purpose of this Regulation:

a. "Air National Guard civilian personnel" means any and all civilians employed by the several States, Territories, Puerto Rico, and the District of Columbia, permanent or temporary, male or female, supported

Plaintiff's Exhibit 3 (Pl. Exh. 210)

wholly or in part by Federal funds appropriated for that purpose, including but not limited to the following:

(1) Air technicians means a person employed for the performance of the duties of positions listed on the manning guide and paid from funds designated for the pay of air technicians. (Pl. Exh. 659)

Plaintiff's Exhibit 3 (Pl. Exh. 210)

ANGM 40-01

AIR NATIONAL GUARD MANUAL

CIVILIAN PERSONNEL MANUAL

1 March 1958

Department of the Air Force—National Guard Bureau
ANG Manual 40-01
Department of the Air Force
Washington, 1 March 1958

FORWORD

The Air National Guard Civilian Personnel Manual is issued to provide staff and operating personnel with a convenient reference to the titles, grade, job number and duties of civilian personnel in the Air National Guard. Provisions are also included for the submission of recommendations for new or revised positions, grades and titles.

Provisions of this manual will govern all Air National Guard civilian employees, including those employed on a temporary hourly rate basis except those hired wholly from State or service contract funds, and will become effective as of 1 April 1958.

All Air National Guard civilian personnel will be permitted access to the contents of this manual and will be

fully acquainted with the duties and responsibilities of their positions.

Recommendations or suggestions for the improvement of procedures or position descriptions of this manual are encouraged. Comments may be forwarded to National Guard Bureau, NG-AFOTP, Washington, D. C.

BY ORDER OF THE SECRETARY OF THE AIR FORCE:

EDGAR C. ERICKSON
Major General
Chief, National Guard Bureau

OFFICIAL:

JAMES E. BARBER
Colonel, NGB
Executive

DISTRIBUTION:

1 ea AG

1 ea USP&FO

4 ea Flying Detach

1 ea Non-Flying Detach

The listing below is in numerical order according to job numbers. The status indicates the position can be occupied by Officer (O), Warrant Officer (WO),* Airman (A), Female (F), and Non-Guardsman (X). The job title and career field title indicate the technician job title and corresponding Air Force career field and title. These are the new position numbers and titles; for the conversion see Section II, Paragraph 12.

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* An airman who is appointed warrant officer may be retained in his airman type position. A warrant officer will not be hired direct into airman type positions except into the position of Aircraft Maintenance Chief, Job Number 43-10.

Plaintiff's Exhibit 3 (Pl. Exh. 210)

Job No.	*Status*	*Job Title*	*Career Field and Title*
00-00	O	Base Detachment Commander	00 Commanders
00-01	O	Base Detachment Commander	00 Commanders
00-02	O	Base Detachment Commander	00 Commanders
00-03	O	Training Site Supervisor	00 Commanders
00-04	O	Training Site Supervisor	00 Commanders
14-00	O	Operations Supervisor	11 Opns & Tng
14-01	O	Flying Training Instructor	11 Opns & Tng
23-00	O	Intelligence Photo Radar Supv	23 Photographic
23-10	A	Photo Technician	23 Photographic
23-11	A	Photo Tech and Repairman	23 Photographic
23-12	A	Photo Lab Technician	23 Photographic
23-13	A	Camera Repairman	23 Photographic
27-10	A	Air Operations Specialist	27 Air Traffic Cont & Wng
27-11	A	Air Operations Technician	27 Air Traffic Cont & Wng
30-00	O	Communications Supervisor	30 Comm & Electronics
30-01	O	Radar Station Commander	30 Comm & Electronics
30-02	O	Radar Station Commander	30 Comm & Electronics
30-03	O	Tactical Control Sq Commander	30 Comm & Electronics
30-04	O	Tactical Control Gp Commander	30 Comm & Electronics
30-05	O	Comm & Electronics Supervisor	30 Comm & Electronics
30-10	A	Radio-Radar Maint Supt. (Ground)	30 Radio-Radar Systems
30-11	A	Radar Maint Tech (Airborne)	30 Radio-Radar Systems
30-12	A	Radar Mechanic (Airborne)	30 Radio-Radar Systems
30-14	A	Radar Maint Technician (Gnd)	30 Radio-Radar Systems
30-15	A	Radar Mechanic (Ground)	30 Radio-Radar Systems
30-17	A	Radio Maint Tech (Airborne)	30 Radio-Radar Systems
30-18	A	Radio Mechanic (Airborne)	30 Radio-Radar Systems
30-20	A	Radio Maintenance Tech (Gnd)	30 Radio-Radar Systems
30-21	A	Radio Mechanic (Ground)	30 Radio-Radar Systems
30-23	A	Communications Technician	30 Radio-Radar Systems
32-10	A	Fire Control Superintendent	32 Fire Control Systems
32-11	A	Fire Control Technician	32 Fire Control Systems
32-12	A	Fire Control Specialist	32 Fire Control Systems
34-10	A	Flight Simulator Technician	34 Training Devices
34-11	A	Flight Simulator Specialist	34 Training Devices
34-12	A	Synethetic Trainer Technician	34 Training Devices
42-10	A	Hydraulic Technician	42 A/C Accessories Maint
42-11	A	Propeller Technician	42 A/C Accessories Maint
42-13	A	Instrument Technician	42 A/C Accessories Maint
42-14	A	Electronic Fuel Cont Tech	42 A/C Accessories Maint
42-15	A	Electrical Technician	42 A/C Accessories Maint
42-16	A	Electronic Fuel Cont. Specialist	42 A/C Accessories Maint
43-00	O	Maintenance Supervisor	43 Maint & Engineering
43-10	O,WO-A	Aircraft Maintenance Chief	43 Aircraft & Eng Maint
43-11	A	Chief Maintenance Inspector	43 Aircraft & Eng Maint
43-12	A	Maintenance Inspector	43 Aircraft & Eng Maint
43-13	A	Aircraft Maint Technician	43 Aircraft & Eng Maint
43-14	A	Senior Aircraft Mechanic	43 Aircraft & Eng Maint
43-15	A	Aircraft Mechanic	43 Aircraft & Eng Maint
43-16	A	Jet Eng Maint Supt	43 Aircraft & Eng Maint
43-17	A	Jet Engine Technician	43 Aircraft & Eng Maint
43-18	A	Jet Engine Mechanic	43 Aircraft & Eng Maint
43-19	A	A/C Dock Superintendent	43 Aircraft & Eng Maint
43-20	A	Flight Engineer Technician	43 Aircraft & Eng Maint
45-10	A	Production Scheduling Tech	45 Productions Control

Plaintiff's Exhibit 3 (Pl. Exh. 210)

Job No.	Status	Job Title	Career Field and Title
46-10	A	Munitions & Weapons Tech	46 Munitns & Wpns Maint
46-11	A	Munitions and Weapons Spec	46 Munitns & Wpns Maint
47-10	A	Motorized Equip Superintendent	47 Motor & Misc. Maint
47-11	A	Mechanic (General)	47 Motor & Misc. Maint
47-12	A	Gnd Pow & Support Equip Rpmn	47 Motor & Misc. Maint
47-13	A	Vehicle Operator (Mechanic)	47 Motor & Misc. Maint
53-10	A	Machinist	53 Metal Working
53-11	A	Sheet Metal Technician	53 Metal Working
53-12	A	Welder	53 Metal Working
55-00	O	Instals Facilities Supv	55 Instals Engineering
57-10	A	Crash/Fire Rescue Specialist	57 Firefighting
58-10	A	Parachute Rigger & Repairman	58 Fabric, Lthr & Rubbr
59-10	A	Boat Master	59 Marine
59-11	A	Marine Engineer	59 Marine
64-00	O	Supply Supervisor	64 Supply
64-01	O	Assistant Supply Supervisor	64 Supply
64-10	A	Editing & Doc Control Tech	64 Supply
64-11	A	Supply Records Specialist	64 Supply
64-12	A	Refueling Unit Operator	64 Supply
64-13	A	Warehouse Specialist	64 Supply
64-14	A	Warehouse Specialist (Apr)	64 Supply
64-15	A	Petroleum Specialist	64 Supply
64-16	A	Clerk Parts (Maintenance)	64 Supply
64-17	A	Purchasing & Contracting Spec	64 Supply
64-18	A	Warehouse Superintendent	64 Supply
64-19	A	Inventory and Inspec Spec	64 Supply
64-20	A	Supply Records Superintendent	64 Supply
64-21	A	Org Supply Superintendent	64 Supply
64-22	A	Org Supply Technician	64 Supply
64-23	A	Clerk Parts (Maintenance)	64 Supply
64-24	A	Org Supply Specialist	64 Supply
64-25	A	Transportation Specialist	64 Supply
64-26	A	Supply Specialist (Apr)	64 Supply
67-10	A	Accounting Specialist	67 Fin, Acctg & Auditing
67-11	A	Finance Specialist	67 Fin, Acctg & Auditing
68-00	O	Accounting Supervisor	68 Comptroller
68-01	O	Accounting Supervisor	68 Comptroller
68-02	O	Accounting Supervisor	68 Comptroller
70-01	O	Administrative Supervisor	70 Administration Services
70-02	O	Administrative Supervisor	70 Administration Services
70-03	O	Administrative Supervisor	70 Administration Services
70-04	O	Administrative Assistant (State)	70 Administration Services
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Plaintiff's Exhibit 3 (Pl. Exh. 210)

SECTION I

GENERAL PROVISIONS

1. *Format*

This manual is issued in loose-leaf form to facilitate reference and current maintenance. Changes to this manual will be effected by rescission, additions, and deletions of specific pages or of entire sections, based on the extent of change to be effected.

2. *Maintenance of Manual*

a. Copy or copies of this manual will be maintained by each office listed on the distribution. Any changes will be forwarded by numbered transmittal sheets and inserted in the appropriate space within the manual.

b. The following internal distribution is recommended:

(1) Each major functional area at a flying base should maintain a copy of the manual—supply, maintenance, operation and administration. The other functional areas will consult the administrative copy.

(2) Each non-flying detachment not located on or not fully dependent on a flying base should maintain a copy to include Headquarters State Air National Guard, electronics and communications units or detachments and other detachments that "need to know" may request copies from National Guard Bureau, AFOTP.

3. *Delegation of Authority*

The authority of the National Guard Bureau to regulate the employment and rates of compensation is contained

Plaintiff's Exhibit 3 (Pl. Exh. 210)

in Department of the Army General Order 96, dated 9 November 1951, subject, "Delegation of Authority for the Employment and Fixing of Salaries for All Caretakers and Clerks in the National Guard Bureau."

4. *Policy*

a. It is the policy of the National Guard Bureau that positions will be classified in an orderly manner to provide a systematic basis for salary or wage determination, as well as for the application of the various processes of air technician personnel management and administration. This policy, applied within the framework of governing laws and regulation, will facilitate the equal treatment within each classification and pay category of employees performing comparable work.

b. In order that this policy may be made operative, it is necessary that pay rates bear a direct relationship to the level of responsibility and qualification required for the work performed. Through a process of job evaluation both National Guard Classified (NGC) and National Guard Maintenance (NGM) positions are graded to provide for the equitable application of the appropriation salary or wage schedules.

c. To provide for effective administration of the program, the classification structure will be maintained through periodic manpower management surveys and desk audits of positions.

5. *Responsibility*

a. Adjutants general of various States, Territories, Puerto Rico or the District of Columbia will be responsible for:

Plaintiff's Exhibit 3 (Pl. Exh. 210)

(1) Insuring that the requirements and policies of the Air National Guard position classification program are followed at all air technician detachments.

(2) Furnishing recommendations, suggestions, and information to the National Guard Bureau on matters pertaining to classification standards, or on policies, techniques, and procedures affecting the position classification program.

(3) Maintains contact with the Civilian Personnel Office at nearest military installation and assists him in gathering information necessary for proper adjustment of the locality pay schedule.

b. The base detachment commander or senior air technician will be responsible for:

(1) Implementing and maintaining the position classification program as a means to facilitate the personnel management process in the accomplishment of the air technician detachment mission.

(2) Furnishing the State adjutants general with information, suggestions, or recommendations pertinent to classification policies, techniques, and procedures affecting the position classification program.

(3) Promoting the position classification program and assuring its understanding and implementation by supervisors and all employees.

(4) Keep current on the standard pay rates in their locality and advise the adjutant general of material changes. Maintain close coordination with the Civilian Personnel Office at the nearest military installation.

6. *Categories of Positions*

There are two major categories of positions in the National Guard Air Technician Program which are the

Plaintiff's Exhibit 3 (Pl. Exh. 210)

National Guard Classified (NGC) type and the National Guard Maintenance (NGM) type.

a. National Guard Classified Type Positions (NGC). This type of category is characterized by administration, clerical, certain supervisory and professional type positions. Numerical designations of the grade are the same as those in the General Schedule of Employees of the United States Civil Service. The National Guard Bureau is guided by the Classification Act of 1949 and pay rates for this category are controlled by Congressional action.

b. National Guard Maintenance Type Positions (NGM). This type of category is characterized by trade, craft, maintenance, and labor type positions. These positions are similar to United States Civil Service Wage Board positions and pay rates are adjusted by periodic surveys conducted by the Army-Air Force Wage Board. The following pay rates are included in this category classification:

(1) *National Guard Maintenance (NGM)*. Technically skilled positions primarily concerned with the accomplishment of specific tasks and duties related to crafts, trades, maintenance of equipment and physical labor. The employees in these positions accomplish tasks and duties as directed by supervisory personnel.

(2) *National Guard Maintenance—Leader (NGM-L)*. Technically skilled positions in which the employees exercise responsibility for the work of the positions stated in (1) above, and participate in the accomplishment of assigned duties and tasks.

(3) *National Guard Maintenance—Supervisor (NGM-S)*. Technically skilled positions primarily concerned with direct supervision of the duties and tasks assigned to the employees in positions (1) and (2) above. Incumbents of

Plaintiff's Exhibit 3 (Pl. Exh. 210)

these positions must be qualified to perform the work assigned to the employees under their supervision.

7. *Use of Manual*

A copy of this manual will be available for review and reference by supervisors and by employees. Ready access to the manual is essential for an understanding by Air National Guard civilian and military commanders of the responsibilities of Air National Guard civilian personnel.

MAINTENANCE SUPERVISOR

Grade: NGC-11

Job Number: 43-00

1. Nature and Purpose of Work:

A. *Introduction:*

The position is located in the Maintenance Division of an Air Technician Detachment. The incumbent is responsible for coordination, supervision and control within the maintenance division for aircraft maintenance, (field and organizational type), electronics, motor vehicle and support equipment. Incumbent will maintain proper administrative practices when carrying out his responsibilities, using all accepted management principles.

B. *Duties:*

1. Supervises the Production Control Section to assure that all activities of maintenance are planned and coordinate properly. Arranges for work assignments and deadlines on priority jobs in coordination with production control.

Plaintiff's Exhibit 3 (Pl. Exh. 210)

2. Will supervise the Quality Control activity to assure that the section complies with all technical orders and similar directives on aircraft maintenance, inspections, and like activities.

3. Establishes, directs, and administers policies and procedures for all maintenance functions to include: electronics, electrical, hydraulics, machinist, welder, instruments, auxiliary hangar equipment, engine shop, motorized equipment, etc.

4. Advises or assists superintendents of the various maintenance areas in the more difficult technical problems involving supply, maintenance, repair, modification and storage. Recommends actions regarding requisitions and disposition of property.

5. May conduct a school or training class for the purpose of training present or future superintendents in the technical administrative problems involving the various functions of management.

6. Is responsible for ground safety, fire and crash rescue as concerns the Maintenance Division.

7. Responsible for personnel practices in the Maintenance Division to include: approval of leave, recommends promotions, separations, transfers, disciplinary actions, interviews new employees, etc.

8. Responsible for obtaining bids for contractual maintenance services. Formulates instructions, specifications, and other material necessary to obtain bids. Decides what bid to accept and assures completeness of contract with coordination with the Base Supply Supervisor.

Plaintiff's Exhibit 3 (Pl. Exh. 210)

C. *Responsibility for Work of Others:*

1. The incumbent is directly responsible for the Aircraft Maintenance Chief, Communications and Electronics Supervisor, and Motorized Equipment Superintendent.

2. The total maintenance area is controlled and managed by the Maintenance Supervisor which involves a minimum of 30 Civilian Air Technician employees.

II. Scope and Effect of Work:

The incumbent is responsible for the efficient management of the maintenance shop, electronics, motor vehicles, and all allied activities. The degree of efficiency with which he operates will directly reflect in the over all operation of the Air National Guard.

III. Supervision and Guidance Received:

Under general supervision of the Base Detachment Commander. The incumbent develops his own work procedures, generally establishes priorities and is primarily responsible for operation of the Maintenance Division.

IV. Mental Demands:

Must be thoroughly familiar with all operations of the Maintenance Division to include all aircraft repair and maintenance, motorized equipment repair, ground safety, supply, etc. Must be able to advise or answer any technical question involving his division. Occasionally operates maintenance function under extensive heavy workload, which calls for organized planning and coordination within the section.

Plaintiff's Exhibit 3 (Pl. Exh. 210)

V. PERSONAL WORK CONTACT:

Contacts are with subordinate personnel Base Detachment Commander, Air Force Inspectors, and visiting personnel from the Air Force and the National Guard Bureau.

VI. QUALIFICATIONS:

A. *Mandatory:*

1. Must possess six years overall experience in all phases of aircraft maintenance and repair of allied equipment.

2. Completion of an Air Force course in maintenance.

3. Must have management background, either military or civilian.

B. *Desirable:*

1. Completion of an Air Force maintenance management course.

2. Be a rated pilot on flying status to enable incumbent to make test flights on assigned aircraft.

AIRCRAFT MAINTENANCE CHIEF

Grade: NGMS-9

Job Number: 43-10

1. GENERAL:

The position is located in the Aircraft Maintenance Section, Maintenance Division of an Air Technician De-

Plaintiff's Exhibit 3 (Pl. Exh. 210)

tachment. The incumbent is responsible for hangar and flight-line maintenance, inspections, and repair of all aircraft, jet or conventional, assigned and transient. Incumbent must be thoroughly familiar with all technical phases of aircraft maintenance and allied equipment. Required to know and understand management prineiples and their application when dealing wtih subordinates. The efficiency with which the incumbent performs his work will contribute greatly to the over-all mission of the Air National Guard within a State.

II. Duties and Responsibilities:

1. Responsible for production planning and control of the Aircraft Maintenance Section, coordinating activities with the Production Scheduling Technician and the Maintenance Supervisor. Arranges for work assignment and deadlines on priority jobs in coordination with production control.

2. Directly supervises all field type maintenance (hangar maintenance) including aircraft docks, and all shops. The shops consist of hydraulic, propeller, instrument, electrical, jet engine repair and build-up, sheet metal, and machinist.

3. Directly supervises all flight line maintenance (organizational maintenance) including all unscheduled maintenance.

4. Assigns work to subordinates considering individual skills, aptitudes and knowledge.

5. Performs necessary follow-up on all assigned jobs. Must be aware of any work stoppage, problems or bottlenecks that may occur during the operation and take neces-

sary steps to resolve these difficulties. Maintenance duties which will be accomplished consist of: scheduled aircraft and engine inspections, scheduled engine and accessory change, unscheduled maintenance, etc.

6. Conducts personnel actions that may include; approval of annual and sick leave and forwards it for final approval, settles complaints arising from work assignments, pay and job requirements, takes necessary action to create good work habits, and shifts personnel as required to meet peak workloads. Refers problems to the Maintenance Supervisor when they cannot be settled at this level.

III. PHYSICAL WORK EFFORT:

Active; climbs, working in straining position.

IV. WORKING CONDITIONS:

Inside and outside work; in proximity of moving propellers and jet engine blasts; danger of falling; danger of fumes and fire from high octane gasoline.

V. QUALIFICATIONS:

A. *Mandatory*:

1. Minimum of five (5) years' experience as an Aircraft Maintenance Technician, either civilian or military capacity.

2. Capable of researching, reading, and understanding technical orders, technical manuals, and stock lists.

3. Must be familiar with Air National Guard and Air Force aircraft maintenance procedures.

B. *Desirable*:

Graduate of formal maintenance training courses equivalent to the requirements for an A&E certificate.

Defendant's Exhibit 7. AFR 45-2 (Pl. Exh. 667)

2. *General. b. Air National Guard*—The National Guard Bureau is charged with administering approved Department of the Air Force policies other than those relative to training, for the Air National Guard not in the Federal service, and with promulgating Department of the Air Force directives and regulations applicable to the Air National Guard, including those relative to training (J.A. 688).

4. *National Guard Bureau Regulations.* a. The National Guard Bureau will, from time to time, publish joint National Guard Regulations when such regulations are applicable to both the Army and Air National Guard, or separate National Guard Regulations when such regulations are applicable to the Army National Guard only or to the Air National Guard. National Guard Regulations will govern the Army National Guard and the Air National Guard when not in Federal service in the same manner as Army Regulations or Air Force Regulations govern the Regular components of the service.

b. Joint National Guard Regulations will be issued subject to the approval of the Chief of Staff, United States Army, and the Chief of Staff, United States Air Force. National Guard Regulations pertaining to the Army National Guard only will be issued subject to the approval of the Chief of Staff, United States Army. National Guard Regulations pertaining to the Air National Guard only will be issued subject to the approval of the Chief of Staff, United States Air Force (Pl. Exhs. 669-670).

Defendant's Exhibit 9. ANGR 50-01 (Pl. Exh. 671)

1. Training authority: The requirements to be met and the sources of authority for the training and instruction of the Air National Guard not in Federal service are set forth in the following:

a. Sections 5, 91, 92, 93, 94, 96, 97, and 99, National Defense Act, as amended, and Sections 201 and 501, Public Law 351, 81st Congress, hereafter referred to as Career Compensation Act of 1949.

b. Air National Guard Regulations.

c. The policies of the Department of the Air Force.

d. The orders, instruction, and training announcements issued by the Chief of Staff, United States Air Force pursuant to authority specifically delegated to him by the Secretary of the Air Force.

e. The orders and detailed instructions promulgated by the Chief, National Guard Bureau to the Air National Guard not in Federal service with the approval of the Chief of Staff, United States Air Force, in amplification of, and to make effective, the polices indicated in c above.

2. National Guard Bureau Instructions. The Chief, National Guard Bureau is charged with promulgating to the Air National Guard not in Federal Service, from time to time, the necessary orders and instructions to make effective the Department of the Air Force training policies.

a. The training of the Air National Guard will conform to the Department of the Air Force policies and directives as prescribed for the Regular Air Force.

b. It will be conducted by the Air National Guard organizations of the respective States under the supervision of the commanding generals of the appropriate major

forces, in accordance with the policies prescribed by the Department of the Air Force. Such supervision will be exercised by:

1. Preparation of training directives.

2. Supervision of United States Air Force Instructors.

3. Authority to conduct inspections.

4. Conduct of tests.

5. Furnishing the Department of the Air Force with appropriate reports on state of training and recommendations for necessary remedial actions (Pl. Exhs. 671-673).

5 United States Code 751

Disability or death of employee: willful misconduct. The United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from a personal injury sustained while in the performance of his duty, but no compensation shall be paid if the injury or death is caused by the willful misconduct of the employee or by the employee's intention to bring about the injury or death of himself or of another, or if intoxication of the injured employee is the proximate cause of the injury or death. (Sept. 7, 1916, c. 457, Sec. 1, 39 Stat. 742.)

Article 1A, sec. 10, pg. 197, Annotated Code of Maryland, 1951

(Collision of Aircraft). The liability of the owner of one aircraft to the owner of another aircraft, or to airmen or passengers on either aircraft, for damage caused by collision on land or in the air, shall be determined by the rules of law applicable to torts on land.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 345

STATE OF MARYLAND, for the use of NADINE Y. LEVIN, ET AL., and STATE OF MARYLAND, for the use of SYDNEY L. JOHNS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

These cases arose out of a mid-air collision over Brunswick, Maryland between a Viscount passenger airplane owned by Capital Airlines and a jet trainer airplane owned by the United States but assigned to the Air National Guard of Maryland. The collision destroyed both airplanes and killed all the passengers and crews, except the pilot of the jet trainer. At the time of the accident, the pilot of the trainer was both

a commissioned officer in the Maryland Air National Guard, not in active federal service, and a civilian employee ("air technician") receiving pay from federal funds pursuant to the so-called "caretaker" statute (Sec. 90 of the National Defense Act of 1916, as amended, 32 U.S.C. 709).

The Third Circuit, reversing a decision of the United States District Court for the Western District of Pennsylvania, held that the United States was not responsible under the Federal Tort Claims Act for the pilot's misconduct.[1] The opinion of the court (per Smith, J.), held (a) that civilian employees of the National Guard receiving pay from federal funds are not employees of the United States within the meaning of that Act (Pet. App. 4a-15a); and (b) that, even if such civilian technicians were federal employees, the pilot here was engaged in a flight under "the control and supervision of the authorized military personnel of the Maryland Air National Guard," rather than under the control of federal officials, so that vicarious tort liability should not be imposed upon the United States" (Pet. App. 16a-18a). Judge Hastie concurred in the result on the ground that the pilot was acting primarily in his capacity as an officer of the Maryland Air National Guard, since the flight was basically a military training flight. Accordingly, liability was barred by the uniform decisions holding that members and officers of the National Guard of the States not in active federal service are not em-

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[1] Pet. App. 1a-26a; 329 F. 2d 722, Petition for rehearing *en banc* denied, Judge Staley dissenting.

ployees of the United States within the meaning of the Tort Claims Act (Pet. App. 20a-21a). Judge Staley dissented.

The Court of Appeals for the District of Columbia Circuit reached a diametrically opposite result in earlier suits arising out of the same collision. *United States* v. *State of Maryland, for the Use of Meyer*, 322 F. 2d 1009, certiorari denied, 375 U.S. 954, now pending on the government's motion for leave to file a petition for rehearing (543, O.T., 1963).[2] In sustaining the imposition of liability upon the United States for the acts of the pilot, it held that civilian employees of the National Guard of the States who are receiving pay from federal funds pursuant to the "caretaker" statute are employees of the federal government within the meaning of the Federal Tort Claims Act; and that while Maryland, like most States, holds an employer accountable for the torts of an employee only if he has the right to direct and control the very activity which causes the injury, the applicable federal statutes and regulations gave the United States an "ultimate right of control" sufficient to warrant imposition of vicarious tort liability. Thus the decision below is in direct and explicit conflict with *Meyer*—a conflict all the more striking in view of the fact that the cases not only arose out of the same oc-

[2] The collision also resulted in actions for seven other deaths. Actions arising from five of those deaths, involving claims of $2,695,000, are now pending in district courts in the Second, Fourth, and Sixth Circuits.

currence, but were decided on the basis of the same record.[3]

The instant petition for certiorari tenders two questions for review (Pet. 3): (1) whether a person who is employed on a full-time basis as a civilian caretaker of federal property is an employee of the United States within the coverage of the Federal Tort Claims Act; and, if so, (2) whether the right of the United States to control his activity at the time of the accident was such that the United States, if a private person, would be liable for his negligence under the applicable State law of *respondent superior* and hence under the Tort Claims Act. The government peti-

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[3] The issue of liability was submitted to the United States District Court for the Western District of Pennsylvania on the record made in the District of Columbia case.

It is not clear, to be sure, whether the two courts placed their decisions on precisely the same facts. Although the district court in the instant cases largely adopted the findings of the trial court in *Meyer*, it implied that the pilot was acting solely in his civilian capacity (Findings 34 and 22, Appendix to Brief for Appellant, pp. 22a and 18a; 200 F. Supp. 475, 480, 478-473), while the court in *Meyer* clearly found that he was performing both training functions related to his military duty and maintenance functions incident to his civilian position (Findings 35 and 23, Pl. Ex. II, pp. 687, 684). The opinion of the court below rejects, without specifically identifying them, some of the district court's findings (Pet. App. 3a). We read the opinion as rejecting only the findings which depart from those in *Meyer*, and as ruling that the absence of a right of control in the United States rendered the activity outside the scope of the pilot's civilian employment, albeit some of his functions were normally incidental to that employment. (Pet. App. 16a-17a, 18a-19a). This approach also appears to have been adopted by Judge Hastie (Pet. App. 20a-21a).

tioned for certiorari in the *Meyer* case on precisely the same issues (Pet. in No. 543, O.T., 1963, p. 2).

Our reasons for believing the issues important, and our position in regard to them, are set forth in full in our petition in *Meyer*.

In view of the importance of the questions presented, and the square conflict of decisions, we do not oppose the petition for certiorari. We suggest, however, that if the Court decides to grant the petition in the instant cases, it would be appropriate also to reconsider and grant the government's petition for certiorari in *Meyer*, so as to assure uniformity of decision in all cases arising out of this major air disaster.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

SEPTEMBER, 1964.

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OCTOBER TERM, 1964.

No. 345

STATE OF MARYLAND for the use of NADINE Y. LEVIN, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

STATE OF MARYLAND for the use of SYDNEY L. JOHNS, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF PETITIONERS.

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Supreme Court of the United States

OCTOBER TERM, 1964

No. 345

STATE OF MARYLAND for the use of NADINE Y. LEVIN, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

STATE OF MARYLAND for the use of SYDNEY L. JOHNS, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF PETITIONERS.

The opinions of the United States Court of Appeals for the Third Circuit in this case are officially reported in 329 Fed. 2d 722 (R. 709). The opinion in the district court (Pittsburgh), including findings of fact and conclusions of law, is officially reported in 200 F. Supp. 475 (W. D. Pa. 1961) (R. 691).

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U. S. C. §1254 (1). Petitioner's application for re-hearing in the Court of Appeals below was timely filed on April 15, 1964 and was denied on April 28, 1964. By order dated June 23, 1964, this Court extended the time herein for filing a petition for a writ of certiorari to and including September 25, 1964, which petition was filed in this Court on August 3, 1964 and granted by order of this court dated October 19, 1964 (R. 734).

Jurisdiction of this court is invoked on the grounds that the Court of Appeals below has rendered a decision diametrically opposed to the earlier and unanimous decision in the companion cases of the United States Court of Appeals for the District of Columbia on the same facts and issues, which decision is reported in *State of Maryland for the use of Meyer, et al.*, v. *United States of America*, 322 Fed. 2d 1009, *cert. den.* 375 U. S. 954 (1964). The *Meyer* decision held that McCoy as "caretaker" pilot of an aircraft owned and maintained by the United States (although allocated to the Maryland National Guard), was a civil employee of the United States within the meaning of the Federal Tort Claims Act, whereas the decision below was directly to the contrary.

The decision below reversing the district court was by a divided court. The majority was split into two separately posited opinions by Judges Smith and Hastie with a dissenting opinion by Judge Staley. Judge Smith held McCoy was not a federal civil employee and, even if he were, was not acting within the scope of his employment. Judge Staley held he was and Judge Hastie "(did) not reach" that question. The court below has reached a conclusion that has the results in one court of appeals (*Levin*) denying liability on the part of the government for one set of claim-

ants (airline passengers' survivors) and another court of appeals (*Meyer*) finding liability on the part of the government for another set of claimants (airline pilots' survivors) even though the claims arise out of exactly the same set of facts.

The Court of Appeals below has rendered a decision in conflict with the decisions of the Courts of Appeals of five different Circuits on the same federal question. The Court of Appeals below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's powers of supervision. The Court of Appeals below has decided important questions of federal law which have not been but should be passed upon by this Court. That all of the foregoing grounds are within the purview of Rule 19(1) of the Rules of the Supreme Court governing review by this court on certiorari and the grounds therefor.

Statutes and Regulations Involved.

1. The pertinent provisions of the Federal Tort Claims Act (28 U. S. C. §§28, 1346(b), 2671) are set out in Appendix hereto page A-1. Section 1346(b) provides that the United States shall be liable:

> ". . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment; under circumstances where the United States, *if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.*" (Emphasis supplied.)

2. The National Defense Act of 1916 (39 Stat. 166) as amended, now the National Guard Act of 1956 provides in pertinent part 32 U. S. C.:

"Section 709. Caretakers and clerks.

(a) Under such regulations as the Secretary of the Army may prescribe, funds allotted by him for the Army National Guard may be spent for the compensation of competent persons to care for material, armament, and equipment of the Army National Guard. Under such regulations as the Secretary of the Air Force may prescribe, funds allotted by him for the Air National Guard may be spent for the compensation of competent persons to care for material, armament, and equipment of the Air National Guard. A caretaker employed under this subsection may also perform clerical duties incidental to his employment and other duties that do not interfere with the performance of his duties as caretaker.

(b) Enlisted members of the National Guard and civilians may be employed as caretakers under this section. However, if a unit has more than one caretaker, one of them must be an enlisted member. Compensation under this section is in addition to compensation otherwise provided for a member of the National Guard.

* * * * * *

(d) Under regulations to be prescribed by the Secretary concerned, one commissioned officer of the National Guard in a grade below major may be employed for each pool set up under subsection (c) and for each squadron of the Air National Guard. Commissioned officers may not be otherwise employed under this section.

* * * * * *

(f) The Secretary concerned shall fix the salaries of clerks and caretakers authorized to be employed under this section, and shall designate the person to employ them. Aug. 10, 1956, c. 1041, 70A Stat. 614."

There are additional pertinent parts of statutes and regulations showing the close federal control over McCoy

and the federal maintenance of federal aircraft which will be found in the Petitioner's Appendix to this brief. These are the following:

National Guard Act, 70A Stat. 597-600, 32 U. S. C. 102, *et seq.*, (Appendix, A-1).

National Guard Regulations No. 75-16; (Plaintiffs' Exhibit No. 15 (R. 634 Appendix, A-5).

National Guard Regulations No. 75-16, (superseded); Plaintiffs' Exhibit No. 16, (R. 641 Appendix, A-8).

Air National Guard Regulations 40-01; Plaintiffs' Exhibit No. 17 (R. 652 Appendix, A-9).

ANGM 40-01, Air National Guard Manual; Plaintiffs' Exhibit No. 3 (R. 210 Appendix, A-11).

ANGR 50-01; Defendant's Exhibit No. 9 (R. 671 Appendix, A-13).

The following statutes are also set out in the Appendix hereto:

Federal Employees Compensation Act, 5 U. S. C. §751 (Appendix, A-14).

Maryland Annotated Code 1957, Article IA, sec. 10, "Collision of Aircraft". (Appendix, A-15).

Annotated Code of Maryland Art. 65, Sec. 11, 15 and 62 (Appendix, A-16).

Questions Presented.

1. Was Julius R. McCoy, who was employed on a full-time basis under the provisions of 32 U. S. C. §709 as a civilian caretaker of the federal property involved herein (a T-33 jet aircraft), an employee of the United States?

2. If McCoy as so employed was an employee of the United States, then, was the right of the United States to

control him at the time of the occurrence, such, that the United States, if a private person, under the *respondeat superior* law of Maryland, would be liable for his negligence herein under the Federal Tort Claims Act?

Statement of the Case.

A. Preliminary Statement:

These are actions under the FTCA against the United States for the wrongful deaths of the plaintiffs' decedents, Levin and Johns, who were passengers in a Capital Airlines Viscount airplane, which was struck in midair by a T-33 jet fighter plane owned and maintained by the defendant, United States, but which had been allocated to the Maryland Air National Guard, the 104th Fighter Interceptor Squadron, as part of the overall national defense plans of the Air Force through the National Guard Bureau, a federal agency. Both aircraft were destroyed and all of the passengers and crews killed except the pilot of the T-33 jet, Julius McCoy. The district court held that at the time of the accident McCoy was employed as a full-time civilian air maintenance technician under Sec. 709 (*supra*) as a caretaker of United States property, acting within the scope of such employment and that the United States was liable under the FTCA. The findings of the district court that McCoy was negligent and its allowance of damages were not disputed by the United States on its appeals from the judgments of that court and are not in issue here.

B. The proceedings below and in the companion *Meyer* cases:

The opinion and findings of fact and conclusions of law and judgments of the trial court, Gourley, Ch. J. were made on the record in the prior consolidated trials of the com-

panion *Meyer* cases in which Judge Mathews (District Judge, District of Columbia) after hearing testimony of witnesses in open court, including McCoy, had found that at the time of the accident McCoy was a civil employee of the United States acting within the scope of his employment within the meaning of FTCA. (Judge Holtzoff later overruled the Government's motion for reconsideration of this issue.) The transcript of the evidence and exhibits in the *Meyer* consolidated trials were received in evidence in the instant *Levin* cases by the district court in Pittsburgh. The findings of fact and law by Judge Mathews were also before that court. This virtually constituted the entire record on appeal before the Court of Appeals below.[1]

The United States, in the above-mentioned *Meyer* cases appealed to the Court of Appeals for the District of Columbia. The judgments in the *Meyer* cases holding that McCoy was a civilian employee of the United States acting in the scope of his employment at the time of the occurrence within the purview of the Federal Torts Claim Act, were unanimously affirmed in *United States to the use of Meyer* v. *State of Maryland*, 322 Fed. 2d 1009.

In the instant *Levin* cases, the United States had also appealed from the judgments in the district court in favor of the plaintiffs to the Court of Appeals for the Third Circuit. After the appeals in the *Levin* cases were argued and while decision therein was being awaited, the companion *Meyer* cases were affirmed on June 13, 1963. Certiorari therein was denied, December 16, 1963. It should be noted that in both the *Meyer* and *Levin* cases the Government's

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[1] By stipulation filed with this court, copies of the printed record on appeal in the *Meyer* case, pp. 17 to 688 were duly filed with this court, and together with the lower court decisions and reprinting of some exhibits, constitute the record on appeal before this court.

briefs and petition for a Writ of Certiorari were based upon identical points.

Copies of such *Meyer* decisions were immediately provided to the Court of Appeals below. Notwithstanding this, on April 1st, 1964 the court below handed down a split decision reversing the district court and directing that judgment be entered in favor of the United States. Thereafter the United States in the *Meyer* case moved this court for a conditional rehearing of its Petition for Certiorari, which motion is still pending and undetermined.

The Facts.

A. The underlying structure of federal statutes and regulations.

In accordance with its authority and policy as set out in 32 U. S. C. §§102 to 710, the United States owned, provided and maintained the airplanes, paid for the fuel, and provided all the equipment for the Maryland Air National Guard Unit based at Martin Field near Baltimore, directly paid the salaries of the civilian personnel employed to maintain such federal property, furnished the spare parts, and made the major repairs (R. 678; Dist. Ct. Find. 3).

The stated policy of the United States in purchasing and maintaining its military equipment (much of which is extremely complicated and costly such as the aircraft involved herein) even though allocated to the various State National Guards and of employing trained and qualified personnel as caretakers thereof, under its ultimate supervision and control as part of our uniform national defense scheme is illustrated by the National Guard Act as amended 32 U. S. C. §110 *et seq.* In addition to those quoted below the most pertinent sections appear in the appendix hereto at page A-1.

SECTION 102, "General Policy" provides in pertinent part:

> "In accordance with the traditional military policy of the United States, it is essential that the strength and organization of the Army National Guard and the Air National Guard as an integral part of the first line defenses of the United States be maintained and assured at all times. . . ."

SECTION 110 provides:

> "The President shall prescribe regulations, and issue orders, necessary to organize, discipline, and govern the National Guard. (Aug. 10, 1956, c. 1041, 70 A Stat. 600)."

Section 307 sets forth the procedure under which an officer of the National Guard obtains Federal recognition.

Section 314 (d) provides that the Adjutant General of each State "shall make such returns and reports as the Secretary of the Army or the Secretary of the Air Force may prescribe, and shall make those returns and reports to the Secretary concerned or to any officer designated by him." (Appendix hereto p. A-2) Sections 318 and 319 provide for special "federal Compensation for disablement during training" for a member of the National Guard. (Appendix hereto p. A-2). Sections 501 to 507 set out the requirements for training of the National Guard pursuant to Federal regulations.

Section 710 (Appendix hereto p. A-3) under subsection (a) provides that "All military property issued by the United States to the National Guard remains the property of the United States." Under subsection (c) it is provided that if the property ". . . was lost, damaged or destroyed through negligence, the money value of the property or

damage thereto shall be charged (1) to the State . . . concerned . . .; or (2) to the member to whom the loss, damage or destruction is charged from pay due him for duties performed in his status as a member of the National Guard." Under subsection (e) "If a State . . . neglects or refuses to pay for the loss . . . charged against it under subsection (c), the Secretary concerned may bar it from receiving any part of appropriations for the Army National Guard or the Air National Guard, as the case may be, until the payment is made."

It is to be noted that since the Federal government here made no attempt to charge or collect against the State of Maryland for the loss of the aircraft (R. 317), it further confirms the fact that the Federal government did not regard the admitted negligence of McCoy as the negligence of an employee of the State of Maryland or of a member of its Air National Guard.

Pursuant to 32 U. S. C. §709 (*supra*) the Department of the United States Air Force through the National Bureau adopted Air National Guard Regulation (ANGR) No. 40-01 with reference to the Air Technicians (Caretakers) employed under Title 32 U. S. C. §709 (Appendix, p. A-9) and delegated to the Adjutants General of the several States only a few duties within prescribed narrow limits subject to the provisions of law and any instructions issued by the National Guard Bureau (headquartered in the Pentagon). Said ANGR No. 40-01 specifically refers to the basic authority for the employment of Air National Guard civilian personnel as being contained in Section 90, National Defense Act, as amended, which was a forerunner of 32 U. S. C. §709 (R. 655-660).

The Department of the Air Force, under authority of the Secretary, adopted Air National Guard Manual (ANGM)

40-01 (R. 210), to govern all Air National Guard civilian employees (except those hired wholly from State or service contract funds) and to provide the staff and operating personnel with the titles, grades, job numbers and duties of civilian personnel in the Air National Guard (R. 210-218). This Manual spells out the authority of the National Guard Bureau of the United States to regulate the employment and rates of compensation of the civilian personnel and points out that such authority is contained in "Department of the Army General Order 96, dated 9 November 1951, subject "Delegation of Authority for the Employment and Fixing of Salaries for All Caretakers and Clerks in the National Guard Bureau." The Manual also contains a description of the duties and qualifications of an Aircraft Maintenance Chief and a Maintenance Supervisor (R. 214-218, Dist. Ct. Find. 5, 6) which McCoy was.

Thus, by Act of Congress, by a General Order of the Department of the Army, by Regulations of the Secretary of the Air Force and by the Manual of the National Guard Bureau, adopted by the order of the Secretary of the United States Air Force, the United States:

1. Provided for spending of Federal money for the compensation of competent persons "to care for material, armament and equipment of the Air National Guard. . . ."

2. Designated the civilian caretaker jobs for maintenance of federal equipment and positions held by Julius R. McCoy (Acting Maintenance Supervisor and Aircraft Maintenance Chief), prescribed the duties and requirements of the jobs, the prerequisite technical training and qualifications for such employment and required that their equipment be maintained and operated in accordance with standards prescribed by the United States Air Force.

B. McCoy's training, employment and supervision by the United States as a civil technician-caretaker pursuant to its statutory structure.

In order to qualify as such air technician (caretaker), McCoy, by order of the Secretary of the Air Force, attended a nine month course for maintenance officers at the United States Air Force Base and Maintenance School at Chanute Air Force Base, Illinois. While attending this school, he was paid by the United States Air Force finance office (R. 43; Dist. Ct. Find. 7).

General Wilson, Deputy Chief of the National Guard Bureau, testified that Captain McCoy was employed on a full time basis in June 1956, under the authority of §709, (R. 330), and Captain McCoy agreed that this Statute described his civilian job (R. 81; Dist. Ct. Find. 7, 8, 9)

ANGM 40-01; p. 107, describes the job of Aircraft Maintenance Chief (R. 218). The job of Maintenance Supervisor is described in ANGM 40-01, p. 105 (R. 216-217).

In June, 1956, when McCoy became a full time Federal air technician-caretaker, with the title of Base Maintenance Supervisor, he was a First Lieutenant in the 104th Fighter Squadron of the Maryland Air National Guard (R. 37-38, Dist. Ct. Find. 13). On May 16, 1958, his job status was changed with Federal approval to Aircraft Maintenance Chief on orders from Col. Victor Kilkowski, Base Detachment Commander (R. 47) who was also employed in a civilian capacity under Sec. 709 and was McCoy's immediate supervisor. As air technician, Aircraft Maintenance Chief, and Acting Maintenance Supervisor, his civilian caretaker jobs, McCoy was employed as an air technician during a normal work week, from 8:00 A. M. to 4:30 P. M., Tuesday through Saturday, except two Saturdays a month, when he would be in his military status during the specified military training period as an officer

in the Air National Guard and as Squadron Maintenance Officer (R. 38). The accident happened on a Tuesday, when McCoy was working on his civilian job (R. 77-78, Dist. Ct. Find. 11, 12, 13).

McCoy was also an officer with the rank of Captain in the United States Air National Guard (ANG) assigned to the 104th Fighter Interceptor Squadron, a federally recognized unit of the ANG of the State of Maryland and had a flying status (R. 37, 38, 41).

At the time of the accident, in addition to carrying out his duties as Aircraft Maintenance Chief, McCoy was acting Maintenance Supervisor (civilian) for the Base in the absence of Major Mitchell, who was away on a training program (R. 40, 48, 71; Dist. Ct. Find. 11). The job description for the position of Maintenance Supervisor provides that it is "desirable" that the incumbent be a rated pilot on flying status to enable him to "make test flights on assigned aircraft" (R. 217; Dist. Ct. Find. 18). In accordance with Air Force Regulations, McCoy as part of his civilian duties flew frequent check flights, supervised maintenance of twenty-eight aircraft, and other equipment owned by the United States, and the seventy-five to eighty civilian maintenance personnel (R. 37, 38, 40, 47, 58, 59, 68, 70, 71, 81, 306, 605; Dist. Ct. Find. 12) and as required by Air Force Regulations, submitted monthly equipment reports to the National Guard Bureau in Washington (R. 43).

The United States provided the buildings, equipment, parts for the equipment and funds for the payment of civilian employees and military members of the unit (R. 311-312). McCoy and other technicians were instructed under an Air National Guard Regulation of the United States Air Force that they were subject to the *Hatch Act* (R. 143), which applies to employees of the United States. To insure that the unit operated the equipment in accord-

ance with standards prescribed by the United States Air Force, an Air Force officer on active duty with the United States Air Force was stationed at Martin Field (R. 330; Dist. Ct. Find. 9) and Air Force Inspection Teams made inspections (R. 307; Dist. Ct. Find. 10).

Aircraft maintenance procedures are set out by the United States Air Force (R. 315), and the responsibilities of Aircraft Maintenance Chiefs and Maintenance Supervisors are outlined by United States Air Force regulations, manuals and technical orders (R. 216-218, 382, 383; Dist. Ct. Find. 9).

McCoy, in his full-time civilian caretaker air technician job, was paid an annual salary in the sum of $7,500.00 by check drawn on the Treasury of the United States. Additionally, he was paid approximately $2,000.00 per year by the United States for his part-time military duties (R. 41; Dist. Ct. Find. 23) in the Maryland National Guard covering two Saturdays a month (Dist. Ct. Find. 13).

C. Flying and checking the performance of federal aircraft allocated to the Maryland Air National Guard which were required civilian duties of McCoy.

The purposes of the flights made by McCoy were often several fold. Any flight he made as an Aircraft Maintenance Officer was to evaluate the condition of equipment (R. 48, 70, 139, 140) and to insure proper maintenance of the equipment over which he had general supervision. It was part of McCoy's duties to make these flight performance checks as part of his air technician's civilian job (R. 75, 76, 77, 79, 402). These flight tests were made by McCoy in his civilian capacity (Dist. Ct. Find. 19 and 20).

General Wilson, head of the Federal Agency (National Guard Bureau) responsible for the promulgation of ANGM 40-01, testified that it was desirable for the maintenance

officer to have a flying status because a maintenance officer should be able to check his own airplanes; that if he were a squadron commander, he would insist that the maintenance officer be a rated pilot because he could do his maintenance job better if he flew planes he maintained; that the other pilots have a safer feeling if they know that the person doing the maintenance is also going to fly the airplane (R. 58, 59, 306). To same effect is the testimony of Col. Kilkowski (R. 605-6) and McCoy (R. 70-71). Col. Kilkowski was McCoy's immediate civilian superior.

Col. Kilkowski testified that as a maintenance officer, as Aircraft Maintenance Chief, and as a pilot, McCoy was more capable of analyzing maintenance problems than the average pilot (R. 169, 170), was required to make frequent flights and *that McCoy was required* to maintain his proficiency to fly for the reason that he had to flight-check aircraft (R. 138, 139, 559 Dist. Ct. Find. 22). A pilot can do air technician (civilian) work while flying the airplane (R. 163, 164). In fact, on April 8, 13, 23, 24, 26, May 4, 10, 15, 16 and 17, 1958, Captain McCoy had performed functional flight checks in his civilian maintenance job (R. 70).

Col. Kilkowski listed a variety of other things that McCoy would have been expected to observe as Acting Maintenance Supervisor and Aircraft Maintenance Chief, which he could better observe from the air. These were: (a) obstructions that might be on the runway; (b) exposed lips of runways that might cause an accident; (c) foreign object damage; (d) cleanliness of his ramp (a piece of wire on the runway or ramp can be sucked into and ruin a $100,000.00 jet engine); (e) condition of the airport; (f) efficiency of the tower personnel; and (g) whether the maintenance people are in front of the intake scoop when the aircraft is parked, and whether they are waiting until the plane stops before they insert the chocks (R. 140).

McCoy as Maintenance Supervisor, in the course of each flight, by the very nature of his function and duty, would be observing the product he was required to maintain for better maintenance, safer aircraft, etc. (R. 164, Dist. Ct. Find. 20).

McCoy also flew the airplanes to satisfy the requirements of Air Force Regulations (AFR) 60-2 and to increase his pilot rating. Although it was necessary initially to have a military status to fly one of the planes, a person flying a plane might be performing the duties of an air technician as McCoy frequently did (R. 162-164; Dist. Ct. Find. 16, 17). McCoy stated that in his capacity as an air technician he took his orders from Col. Kilkowski, and while in his military status, he took his orders from Major Scott, the Squadron Commander (R. 41, 42).

D. McCoy's continued civilian caretaker function, duties and work at the time of the accident.

On the morning of Tuesday, May 20, 1958, McCoy reported to the base and commenced work at the usual starting time on his regular full-time civilian caretaker job as Aircraft Maintenance Chief (R. 67, 68; Dist. Ct. Find. 26), and as Acting Maintenance Supervisor in Major Mitchell's absence (R. 77-78; Dist. Ct. Find. 11). Before the flight, he performed certain administrative duties, incidental to his civilian capacity, was carried on the roster in his air technician pay status, and ultimately was paid for that day by the United States Treasurer in this capacity (R. 77-78; Dist. Ct. Find. 26).

McCoy could only occupy one pay status at a time, either that of a civilian caretaker in maintenance work, or that of a member of the Air National Guard in a military capacity. When the accident occurred he was occupying his civilian pay status (R. 586-87, Dist. Ct. Find. 24).

At the time of the accident, McCoy had accumulated more than the number of flight training hours for which he could earn flight pay under the provisions of AFR 60-2 for the period in question. His flight on May 20, 1958, therefore, was not to earn flight pay (R. 135-6; Dist. Ct. Find. 25). He performed the duties of an air technician that day up to and including the occasion of the accident (R. 67, 78). At the time of the accident, he was flying in the capacity of a caretaker of Government property (R. 80; Dist. Ct. Find. 21 and 22).

As to the specific flight, which was authorized by Base Commander Kilkowski (R. 139), McCoy stated that his purpose was to check the quality control of the product he was maintaining, to evaluate the equipment as to its maintenance and to maintain proficiency. He had a better opportunity to observe the quality of maintenance of the equipment by flying the plane (R. 70, 399). During the flight, he watched the instruments, and observed that the plane was behaving properly, that there were no mechanical difficulties and that the instruments were functioning properly (R. 120; Dist. Ct. Find. 15).

The printed flight form (R. 209) for the flight involved in the occurrence was an all purpose form used for all flights regardless of the nature of the flight, including flights in connection with the maintenance of planes (R. 69; Dist. Ct. Find. 15). It was not a training mission (R. 80, 121, 136, 146-7, 152-3, 161-3, 586-7). The printed form referring to a "proficiency flight" has multiple purposes, including evaluation of maintenance of the equipment, which was a responsibility of McCoy in his employment under 32 U. S. C. §709(a) (Dist. Ct. Find. 20). During the course of the flight in question, McCoy checked the efficiency of the equipment and evaluated the quality of the

maintenance, and the purpose of his flight was part of his civilian maintenance function (R. 162, 493-495, 616; Dist. Ct. Find. 21, 22).

McCoy was accompanied on the flight by a passenger, Donald Chalmers, a member of the Maryland Army National Guard. Chalmers had been required to sign a release (R. 689) prior to the flight releasing *the United States* and the State of Maryland from liability due to "negligence, faulty pilotage, or structural failure of the aircraft" (R. 698; Dist. Ct. Find. 28).

E. Admissions and other conduct of the United States further indicating the federal employment relationship.

Subsequent to the occurrence, McCoy received benefits under the provisions of the Federal Employees' Compensation Act, 5 U. S. C. §751 (Appendix, p. A-14) which provides for payment of compensation by the United States to an employee of the United States injured "while in the performance of his duty." The facts and papers pertaining to McCoy's compensation claim (R. 224-230) were investigated and processed in the due course of, and as required by his employment by Col. Ebaugh, United States Property and Fiscal Officer for the State of Maryland, a Federal employee, on forms provided by the U. S. Department of Labor specifically used for caretakers-technicians (R. 240-241). After due investigation in accordance with his findings (R. 245) Col. Ebaugh in due course certified with emphasis as follows:

> "I certify that Julius R. McCoy was working as a Civil Employee of the United States at the time of injury and *not* as a member of the Maryland National Guard (R. 228).

McCoy's claim was then forwarded to Mr. Stasko, Acting Claims Examiner Supervisor of the Bureau of Employees Compensation, Department of Labor. Stasko testified that in the course of his work, he adjudicated claims such as McCoy's; that such cases were handled in the same manner as cases involving other employees of the United States Government, that certain basic forms were required in the processing of each claim (R. 187), and that in the case of National Guard employees, the Bureau required certification by the United States Property and Disbursing Fiscal Officer as to an individual's type of employment at the time of injury (R. 186-188). Stasko reviewed the claim of McCoy and adjudicated that McCoy was in the performance of his duty as an employee of the United States at the time of the accident. McCoy's medical bills incurred as a result of the accident were paid by the United States (R. 191).

Subsequently, at the request of the United States, and pursuant to Statute, McCoy executed an assignment to the United States under the provision of the Federal Employees Compensation Act. of his rights of action against Capital Airlines and others, and said assignment prepared by the United States, stated that he was employed by the Department of the Air Force as an Aircraft Maintenance Chief (Pilot) at the time of the occurrence (R. 227). The United States at no time offered testimony to show that a mistake or error was made by either Col. Ebaugh or the Department of Labor. McCoy did not fly following the occurrence because he had submitted a voluntary request to be removed from flying status. The decision to remove him from this status required the approval of the United States Air Force (R. 166).

General Wilson testified that the State of Maryland did not reimburse the United States for the loss of or the cost

of the airplane, nor did the Federal Government make any request for reimbursement nor contemplate making one (R. 317). In this connection it should be noted that under 32 U. S. C. §710(c), if property of the United States is destroyed through negligence the United States may make a charge or offset against the State involved. Although McCoy's negligence was admitted, the United States did not make a charge or offset against the State of Maryland. This is another indication that the United States regarded McCoy's act as that of its own servant and not that of a servant of the Maryland Air National Guard.

F. Other significant admissions by the United States in its briefs.

In its brief to the court below, the government in stating the "Questions Presented" said at p. 12:

> ". . . because he [McCoy] was also performing duties incident to his employment as a civilian employee. . . ."

In its brief to the Court of Appeals for the District of Columbia, the Government stated at p. 16:

> "Regardless of whether Captain McCoy was also acting in his civilian capacity, *the situation presented by this case . . .*" (Emphasis supplied.)

In its Petition for the Writ of Certiorari in *Meyer*, page 14, the Government states that the first question is:

> ". . . whether *civilian personnel* of the National Guard are 'employees of the United States'." (Emphasis supplied.)

Again at page 27 of the aforesaid Petition, the Government states that the air technician, Captain McCoy, was

engaged at the time of the accident, in both flight training *and in maintenance activity:*

> "Thus, it would be wholly unreasonable to make the liability of the United States turn upon whether, at the time of the accident, the air technician is engaged in flight training, in maintenance activity, or (like Captain McCoy) in both."

G. The Air National Guard.

The overall purpose of the National Guard is to provide a pool of combat ready reserve forces to be used in case of an emergency involving the defense of the United States 32 U. S. C. Sec. 102. The National Guardsmen are required by 32 U. S. C. Sec. 312 to take an oath of office when they become members of the National Guard, to obey the President of the United States as well as the Governor of the State and to uphold the Constitution of the United States.

The organization of the Air National Guard and the composition of its units is the same as that prescribed for the United States Air Force subject, in times of peace, to such general exceptions as the Secretary of the Air Force may authorize, 32 U. S. C. Sec. 104(b). The Air National Guard of the United States is composed of federally recognized units of the Air National Guard and members of the Air National Guard of the United States, who are also reserves of the Air Force, 10 U. S. C. Sec. 8077, which constitute the ready reserve of the Air Force, 10 U. S. C. Sec. 269 (b). An officer of the Air National Guard of the United States whose federal recognition as a member of the Air National Guard is withdrawn, automatically becomes a member of the Air Force Reserve, 10 U. S. C. Sec. 8352(b).

Formation of a state National Guard unit is initiated by the Secretary of the Air Force when he informs the

National Guard Bureau that there is a need for a particular type of unit. If inspection shows that a state unit has met Air Force requirements, a certificate of federal recognition is issued by the National Guard Bureau under authority of the Secretary of the Air Force. At that time the personnel and the unit become eligible for the receipt of federal support (Gen. Wilson R. 280, 281).

The National Guard Bureau located at the Pentagon, acts as a liaison for the Secretary of the Air Force with the various state units in the supervision of the training of the units and maintenance of federal equipment in conformity with procedures and standards prescribed by the Secretary of the Air Force. Its ranking officers are on active duty with the United States Air Force (Gen. Wilson R. 309, 311, 314; Kilkowski 559). An annual budget for the Air National Guard to cover material, parts, pay of personnel, etc. is prepared under the direction of the National Guard Bureau and submitted for Congressional approval (Gen. Wilson R. 286, 287).

The qualification and requirements for officers in Air National Guard units are prescribed by Air Force Regulations and Air National Guard Regulations. If the applicant is found to meet the qualifications by a Federal recognition board, his application is forwarded to the Chief, National Guard Bureau, who forwards it to the Secretary of the Air Force. If Federal recognition is not extended, the unit would have to get rid of the individual (R. 134, 288, 289, 562.)

A rated officer on flying status receives additional compensation in the form of flight pay (R. 285, 292, 327), and his flying authorization comes from the National Guard Bureau (R. 299, 300, 307, 308, 322, 327, 337, 559). The regulations of the Air National Guard governing the training and activities of the units are promulgated by the National

Guard Bureau, as a part of the United States Air Force (R. 314, 322) and are similar to and as fully as practicable, embody the regulations governing the United States Air Force (R. 322). As a pilot, Captain McCoy was required to fly his aircraft subject to the provisions of Air Force Regulations 60-16 (R. 130, 544, 545).

The United States determined the amount of pay for all of the National Guard on military duty (R. 125, 126, 128) and the number of hours required (R. 127, 220). The Federal Government furnishes the funds for recruiting personnel for the National Guard (R. 316). The State of Maryland made no contributions for the costs of the 104th Squadron (R. 335) and only 25% of the costs of some minor services such as janitorial (R. 335).

The Air National Guard had some twenty-four wings of which seventy-three squadrons were equipped with jet fighters. All of these units had a D-Day Mission with a major command in the Air Force (Gen. Wilson R. 321).

The Air National Guard operates at large without regard to state boundaries. According to Standing Operating Procedure No. 3, promulgated January 2, 1957, (Defendant's Ex. 3, R. p. 663), the local flying area for the 104th Fighter Interceptor Squadron, included the States of Maryland, Pennsylvania, New Jersey, Delaware and Virginia.

The 104th Fighter Interceptor Squadron was a federally recognized unit and a part of the air division at Andrews Air Force Base. As such, it had been given a D-day mission with the Air Defense Command in the role of fighter interceptor squadron for which it was trained and equipped. In case of emergency or requirement by the Air Force, the 104th was required to be able to get at least fifty percent of its aircraft fully armed in the air in the first hour (Gen. Wilson R. 333).

H. Findings of the district court on the federal employer-employee relationship.

The underlying facts as hereinbefore outlined at subdivisions (b) to (e) were as found by Chief Judge Gourley who made 34 detailed findings of fact that show both the extent of control by the Federal government and the right to control (R. 692). It is sufficient at this point to refer by way of summary only to a few of the principal findings:

That the aircraft operated by McCoy was owned by the United States and allocated to the Maryland Air National Guard. That the United States paid all operating and maintenance costs, including the salaries of all civil and military personnel. (Finding 3). That at the time of the accident McCoy was employed as a full-time civilian air technician (Aircraft Maintenance Chief and Acting Maintenance Supervisor), and was paid directly by the U. S. Treasurer, pursuant to §709(a) (Findings 4, 5, 11, 12, 13 and 23); that at the time of the occurrence, McCoy was the only officer in aircraft maintenance at the base (Finding 11); that he was employed during the normal work week from 8:00 A. M., to 4:30 P. M., Tuesday through Saturday except 2 Saturdays a month when he was on duty in his status as a military member of the Maryland Air National Guard (Finding 13); that the accident occurred on a Tuesday, when McCoy was working in his civilian capacity (Finding 13); that McCoy applied to his immediate superior Kilkowski, a civilian employee and received permission to make the flight (Find. 15), which flight was a part of McCoy's job as civilian caretaker technician to check the proficiency of the aircraft's condition and maintenance (Findings 17, 18, 19, 20, 21, 22 and 24); that during the course of the flight McCoy checked the efficiency of the aircraft and its equipment in order to determine if it was working properly and if the maintenance thereon was pro-

perly performed (Finding 21); that on May 20, 1958, he commenced work on his full time civilian caretaker job and before the flight, he performed certain of his daily civilian administrative duties; that at the time of the occurrence, he was recorded as working in a civilian capacity as an air technician and was ultimately paid by the United States in this capacity (Finding 26); that following the accident, he applied for benefits as a civil employee of the United States under the Federal Employees' Compensation Act (Finding 29); that it was determined by the Base Detachment Commander, by the United States Property and Fiscal Officer for the State of Maryland and by the Department of Labor, that he had been injured while in the course of his employment as a civil employee of the United States and not as a member of the Maryland Air National Guard, and compensation benefits were, therefore, adjudicated on his behalf (Findings 30, 31, 32, 33); and finally the district court found:

> "34. In operating the airplane at the time of the occurrence, Captain McCoy was carrying out his civilian work as Aircraft Maintenance Chief and Acting Maintenance Supervisor of the Base, and therefore, was a civil employee of the United States acting within the scope of his employment."

The court also concluded as matter of law and fact that:

> "1. A person employed as an air technician (caretaker) in a nonactivated National Guard unit is an employee of the United States within the meaning of the Federal Tort Claims Act.
>
> 2. Captain Julius R. McCoy at the time of the accident was an employee of the United States acting within the scope of his employment within the purview of the Federal Tort Claims Act." (R. 707)

It should be noted that Judge Gourley's findings of fact and conclusions of law were practically the same as Judge Matthews in the *Meyer* case (R. 679-687) unanimously affirmed by the District of Columbia Court of Appeals, and which were also approved by Judge Staley in his vigorous dissent in the Court of Appeals below.

The Opinions of the Court of Appeals Below.

The majority below reversed the district court on the facts and the law. Judge Smith held that as a matter of law McCoy was not a civil employee of the United States and concurring Judge Hastie did "not reach" the question. In arriving at his conclusion Judge Smith specifically rejected a long line of appellate cases holding that a civil technician-caretaker was an employee of the United States. Judge Smith's reasoning rested essentially upon an assumption that military members of Air National Guard not called into service by the Federal Government are state rather than federal employees, which assumption was based upon his interpretation of the function of a militia under the federal constitution. However, Judge Smith failed to distinguish between military members of the National Guard and civilian caretakers employed under Sec. 709 to maintain federal property. As Judge Staley observed in his dissenting opinion (329 F. 2d 722, 732; R. 726):

> "On this question, historical and constitutional considerations as to the status of members of the National Guard are simply not relevant. For we are concerned with the status of Captain McCoy, not as a member of the National Guard, but *as a civilian caretaker* or air technician employed under 32 U. S. C. §709 (a) 'to care for material, armament, and equipment of the Air National Guard * * * '

which is property of the Federal Government." (Emphasis supplied.)

Judge Smith also cited some cases which held that members of the National Guard were state employees, finding no significance that in all these cases there were no civil technician-caretakers involved.

Judge Staley disagreed (p. 733):

> "Hence, in ordinary circumstances, members of the National Guard would be considered Federal employees because substantial elements of control over them are vested in the United States. However, because of the constitutional provision with respect to the militia, several cases have held that members of the National Guard who have not been called into active service are state and not Federal employees. See the cases cited in the majority opinion. I have already indicated my disagreement with that conclusion. But, *in any event, there is no such constitutional or statutory provision with respect to civilian caretakers.* Accordingly, in determining their employment status an analysis of the incidents of employment is of critical significance. As has been previously indicated, such an analysis of McCoy's status as a civilian caretaker of Federal property leads to the ineluctable conclusion that, in this capacity, he was an employee of the United States." (Emphasis supplied.)

But Judge Smith then went on to compound his error. He stated that "even if we assume that Captain McCoy, in his civilian capacity, was an employee of the United States" he was nevertheless acting in his military capacity (p. 729).

Judge Smith then proceeded to make his own finding of fact that McCoy was on a "training flight" in his (military) capacity as an officer of the Maryland Air National Guard, and treated the mass of uncontradicted evidence to the con-

trary and the various governmental admissions as irrelevant.

Judge Hastie, concurring in result, agreed with this finding but said (p. 732):

> "I join in the decision reversing the judgment of the district court, but without expressing any opinion upon that portion of the disagreement between my colleagues which concerns the status of civilian aircraft maintenance workers employed to care for federally owned planes while in the custody of National Guard units."

In making this new finding of fact, Judge Smith declared at page 723 that he was not bound by the "clearly erroneous test" of Rule 52 (a) of the Federal Rules of Civil Procedure, on the ground that the record was not made in the United States District Court in Pittsburgh but in the United States District Court for the District of Columbia.

The dissenting opinion of Judge Staley wholly disagreed with the majority on the law and on the facts, and cited and followed the decision in the companion *Meyer* cases and the decisions in the "caretaker" cases. Judge Staley affirmatively found it "abundantly clear" (p. 732) that in law and in fact McCoy was a civil employee of the United States acting in such capacity at the time of the accident.

SUMMARY OF ARGUMENT

I.

The United States is liable under the FTCA for the negligence, within the scope of his employment, of a civilian air technician caretaker of federal property.

The divided Court of Appeals below is in direct conflict on the law and findings of fact with the prior decision on the same record of the Court of Appeals for the District

of Columbia in the *Meyer* cases, and with a long series of decisions. This Court should act in accordance with these decisions and settle the rule in keeping with the spirit and intent of the federal statutes and regulations and the underlying factual structure and hold that a maintenance-caretaker employed under 32 U. S. C. §709 is an employee of the United States within the purview of the FTCA.

A. Civilian Air Technician-Caretakers employed pursuant to 32 U. S. C. §709 are employees of the United States within the purview of the FTCA.

McCoy was employed as a full time civilian maintenance technician under the specific direction and authority of federal statutes and regulations. The structure of federal statutes and regulations govern the detailed training, qualifications, performance, standards, hours of employment and rates of pay for a caretaker of federally owned military equipment (in this instance aircraft of an Air National Guard fighter squadron). All costs of maintenance and operation of the aircraft were borne by the federal government. McCoy was paid directly by the Treasurer of the United States. The federal statutory and regulation arrangement is supported herein by a mass of essentially uncontradicted evidence establishing that in fact there is detailed supervision and control of every phase of his work by the United States, and that the role, if any, of the State of Maryland, is nominal.

The fact that McCoy was also a member of the Air National Guard of Maryland is immaterial. There is nothing in the Constitution or in composition of the National Guard that places a civil caretaker of federal property in the same status vis-a-vis the federal government as a military member. A long line of "caretaker" decisions from

the *Holly* case, 192 F. 2d 221, to the decision in the companion *Meyer* cases supports this view.

B. McCoy was acting within the scope of his civilian employment as a technician-caretaker at the time of the accident.

The uncontradicted testimony of McCoy and his superior, Kilkowski, establish that at the time (Tuesday) of his operation of the aircraft, McCoy was performing maintenance checks on the aircraft as a part of his duty and function as a civilian air technician and during his regular employment hours as such. His military duties were performed on two Saturdays a month. The defendant has admitted that McCoy was, at least in part, performing this civil function. Even if McCoy were performing a dual function the United States would nevertheless be liable under the applicable *respondeat superior* law of the State of Maryland. McCoy's status as an "employee" meets all of the indicia of "right of control" by the United States within the meaning of the FTCA. Under the Maryland law a person can be acting at the same time for two employers.

The abundant evidence herein is supported by the strong presumption (unrebutted) under the law of Maryland, the place of the accident, that the United States' owned plane was being operated by its agent or servant acting within the scope of his employment. This presumption alone is sufficient.

C. The employment certification and adjudication by agencies of the United States as admissions against interest.

Additionally, there are significant admissions made by defendant (1) through its employee, Colonel Ebaugh, on active duty for the United States as United States Property

and Fiscal Officer for the State of Maryland, and (2) by the Bureau of Employees' Compensation, Department of Labor, in their findings duly made in the regular course of their employment that McCoy was acting as an employee of the United States when injured. Defendant's briefs below have admitted that McCoy at the time had at least a dual function in his civilian and military capacities.

D. The court was in error when it made a finding of fact that McCoy was engaged in a "training flight" as a Military officer contrary to that made in the district court below and disregarded the "unless clearly erroneous rule" of Rule 52a F. R. C. P.; that said new finding was unsupported by and contrary to the evidence.

The majority judges grasped at the use of a flight authorization form (R. 209) which contained the generalized words "flying proficiency" as indicating this was a training flight; but each overlooked the uncontradicted testimony that this broad general term included the flying *proficiency of the aircraft* and its operation by a civilian maintenance technician-pilot in the course of his duties as such, and that this was the purpose of the flight which was not a pilot training flight. (McCoy—R. pp. 70, 71, 80, 120, 124, 493, 494; Kilkowski—R. 136, 138, 140, 146, 587, 605, 606, 616; Gen. Wilson—pp. 58, 59, 306.) It is respectfully submitted that the making of a new finding of fact by an appellate court contrary to uncontradicted evidence, the Maryland presumptions and the admissions by the defendant is a tenuous ground upon which to rest an otherwise unsupported decision of reversal with its attendant wide repercussions. In any event the United States would still be responsible under the *respondeat superior* rule of Maryland.

II.

Assuming but not admitting McCoy was engaged in some military training activity at the time of the occurrence the United States is nevertheless liable.

The 104th Fighter Squadron of the Maryland Air National Guard is clearly part of our national defense system rather than a state military force. The selection, training and appointment of McCoy as a Captain pilot by the Secretary of the Air Force, is actual and detailed under federal statutes and regulations, whereas the interest and function of the state particularly in an activity of this kind is nominal. In law and in fact the operation and control of members of the Air National Guard reside in the United States. The declared policy of the United States is to regard the National Guard as part of its National Defense System and that all military property issued to the National Guard remain the property of the United States.

Whereas in fact the State of Maryland has its own statutory provisions for its separate military force which it designates as the "Maryland State Guard".

III.

The prior *Meyer* decision operated as a collateral estoppel.

The Government became collaterally estopped by the prior final judgments in *Meyer* cases on the common issue of liability.

ARGUMENT.

I.

The United States is liable under the Federal Tort Claims Act for the negligence within the scope of his employment of an air-technician civilian caretaker of federal aircraft.

A. Civil air technician-caretakers employed pursuant to 32 U. S. C. §709 are employees of the United States within the purview of the FTCA.

The FTCA being remedial it should be liberally construed. *United States* v. *Yellow Cab Co.*, 340 U. S. 543 (1951).

The combined structure of Federal statute and regulations embody the basic authority for the employment of National Guard Civilian Caretaker personnel. This structure shows that the ultimate control and right of control over the civilian caretaker personnel remains in the United States under the close and detailed supervision of the Federal air arm with respect to qualifications of personnel and standards of performance. This structure of federal employment, control and authority over McCoy is evidenced by an Act of Congress, (Sec. 709) by General Order 96 of the Department of the Army, Regulations of the Secretary of the Air Force (ANGR 40-01), and is supported in actual fact and practice by the detailed evidence herein with respect to federal control over McCoy's training, employment and duties as a civil caretaker of the federal aircraft of a fighter squadron, all demonstrated to be a part of a National Defense establishment.

The federal interest in maintaining its properties is again indicated by the specific provision of 32 U. S. C. §710 (a) which states:

"All military property issued by the United States to the National Guard remains the property of the United States."

It is respectfully submitted that the federal structure of statute and regulation, of detailed supervision over selection, qualifications and employment of McCoy and of his maintenance of its property establish United States employment of and control over McCoy. As the unanimous court held in *Meyer* (322 F. 2d 1009, 1012):

> "He (McCoy) was so employed to assist the National Guard, but also to assist the United States. In his property maintenance function he was paid by, and the ultimate right of control over him was in, the United States. The functions lodged by the United States in the State Adjutant General did not serve to supplant this right of control in the United States, though it may be said to have been ancillary thereto. Such supervision as was lodged in the State did not make Captain McCoy an employee of Maryland. A foreman, for example, is not the employer of the one whose work he may in some respects supervise. There is of course a close relationship between the State of Maryland and the United States in the maintenance of federal property allocated to the Maryland National Guard, but this does not tip the balance toward the State on the issue of employment; for too much begins and remains with the United States in the case of these caretakers of federal property."

McCoy met the criteria of master and servant under the law of Maryland. In *Keitz* v. *National Paving & Contracting Co.*, 214 Md. 479, 491, 134 A. 2d 296, 301, the Maryland Court of Appeals (1957) held that:

> ". . . it has been stated by this court that there are at least four criteria that may be considered

> in determining the question whether the relationship of master and servant exists. These are: "(1) the selection and engagement of the servant, (2) the payment of wages, (3) the power to discharge, (4) the power to control the servant's conduct, (5) and whether the work is a part of the regular business of the employer."

It has been demonstrated that all of these elements are present here, that ultimate authority to control all aspects of the employment relationship with respect to caretakers is vested in the United States. As was said in the *Meyer* opinion (p. 1014), citing the *Keitz* case in detail as noted above and saying further:

> "Not only was the Captain an employee of the United States but he was also 'acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law' of Maryland where the negligence occurred. A private person in Maryland is liable for the negligence of his servant in the circumstances set forth in *Keitz* v. *National Paving & Contracting Co.*, 214 Md. 479, 491, 134 A. 2d 296, 301 (1957)."

However, only Judge Smith of the majority judges below reached the issue of McCoy's federal employment. In reaching his decision Judge Smith specifically repudiated a long line of appellate court decisions uniformly holding that a technician-caretaker in a non-activated State National Guard unit is a federal employee within the purview of the FTCA. Judge Smith frankly conceded he was in conflict with the following caretaker decisions, viz.: *United States* v. *Holly*, 192 F. 2d 221 (10th Cir. 1951); *Elmo* v. *United States*, 197 F. 2d 230 (5th Cir. 1952); *Courtney* v. *United States*, 230 F. 2d 112 (2d Cir. 1956); *United*

States v. *Wendt*, 242 F. 2d 854 (9th Cir. 1957) and the *Meyer* decision. As justification for his view Judge Smith relied upon cases which are readily distinguishable since they did not involve caretakers. (These cases will be discussed later under this point.)

As was pointed out by Judge Staley in his dissenting opinion (p. 732):

> "On this, the vital question in this case, the majority candidly admits that each and every one of the reported cases is arrayed against it, for each of them holds that when acting in this capacity such a caretaker is an 'employee of the Government' within the meaning of the Federal Tort Claims Act. See the cases cited in the majority opinion."

In the prior companion *Meyer* cases, the Court of Appeals for the District of Columbia expressly approved and followed the *Holly* line of caretaker cases. In *Meyer*, the court found abundant support in the record for holding that McCoy was a civilian technician caretaker in the employ of the United States and acting within the scope of his employment. There the court ruled (p. 1012):

> "We hold with the District Court that in his civilian capacity as a caretaker of property of the United States Captain McCoy when on this flight, which entailed the performance of his caretaker and maintenance duties, was an employee of the United States within the terms of the Federal Tort Claims Act. See *United States* v. *Holly*, 192 F. 2d 221 (10th Cir. 1951); *Elmo* v. *United States*, 197 F. 2d 230 (5th Cir. 1952); *United States* v. *Duncan*, 197 F. 2d 233 (5th Cir. 1952); *Courtney* v. *United States*, 230 F. 2d 112, 57 A. L. R. 2d 1444 (2d Cir. 1956); *United States* v. *Wendt*, 242 F. 2d 854 (9th Cir. 1957). He was so employed to assist the National Guard, but also to assist the United States."

After a detailed review of his duties the court properly found that the United States had the ultimate control over McCoy (p. 1013):

> "In his property maintenance function he was paid by, *and the ultimate right of control over him was in, the United States.*"

And at p. 1014:

> "The fact that this caretaker was also an officer of the National Guard with other duties in that respect did not remove him from the federal employee status while he was actually performing the duties incident to that status." (Emphasis supplied.)

In *Holly*, Maness, a member of the Oklahoma National Guard, was driving a jeep which struck Holly's automobile, causing injuries. At the time of the occurrence, Maness was employed as a "unit caretaker." In an action brought to recover damages for the injuries caused by the collision, the trial judge found in favor of the plaintiffs, and, on appeal, the only question presented to the court was whether Maness was an employee of the United States within the meaning of the FTCA. The reviewing court held that he was, stating that 32 U. S. C. §42 (now §709) authorizes the employment of caretakers for the care and maintenance of materiel, animals, armament and equipment belonging to the United States and assigned to the National Guard organizations; that these caretakers are paid from funds allotted by the Secretary of the Army for the support of the National Guard under regulations prescribed by the Secretary of the Army, and is in addition to any pay authorized for "members" of the National Guard; that National Guard Regulation No. 75-16, promulgated by the Secretary of the Army, (its Air Force counterpart is ANGR 40-01) delegates to the Adjutants General of the states authority to employ, fix rates of pay, establish duties, and to discharge caretakers, subject to instructions by the

Chief, National Guard Bureau. The court further noted that the regulations provide in detail the right of caretakers to annual leave, sick leave and military leave, including accumulation of annual and sick leaves. The court then held, page 223:

> "Thus the Federal statute creates the position of unit caretaker and generally outlines the duties. The pay for these services is wholly from Federal funds. The regulations define the duties and responsibilities in detail. The maximum pay scales are fixed by the Secretary of the Army, while actual rates of pay, within the limits fixed by regulation, are established by the State Adjutant General by virtue of the delegation of that power from the Secretary of the Army. The primary duties of the caretakers are the care and maintenance of Federal property assigned to the National Guard for military purposes. Through the State Adjutant General, *the Secretary of the Army and the Chief of the National Guard Bureau have complete control over the work of the caretaker, including his employment and discharge.* The Federal government maintains a reasonable measure of direction and control over the method and means of a caretaker's performing his service. There is present every element necessary to constitute a unit caretaker an employee of the United States." (Emphasis supplied.)

And in response to the argument of the government that Maness was a "member" of the National Guard, the court stated, page 223:

> "The fact that under the regulations the caretaker must be a member of the National Guard and perform duties for the State is immaterial. The injuries were caused while the caretaker was in the performance of his duties for the United States, not the state."

Holly was decided by the same court that decided *Williams* v. *United States*, 189 F. 2d 607 (10th Cir., 1951), relied upon by Judge Smith in this case. In the *Williams* case, which involved a "member" of the National Guard who was not also employed as a civilian caretaker, the court held that "members" of the National Guard, not in active federal service, are not employees of the United States.

In *Wendt*, where a U. S. Army truck and trailer was driven by Brown, a member of the Washington (State) National Guard who was also employed as Supply & Maintenance Technician (formerly "unit caretaker"), the Court was not led astray by the change in terminology, and stated, page 855:

> "At the time of the collision and at all pertinent times, Brown was a member of the Washington National Guard, but was also employed as a civilian administrative, supply and maintenance technician . . ."

The Court then pointed out in a footnote that such technicians (as Brown) were formerly called unit caretakers, but that Brown's employment and duties were similar to those of a caretaker involved in the *Holly, Elmo, Duncan* and *Courtney* cases. The Court then held that Brown was an employee of the United States at the time of the occurrence.

In *Elmo*, Lejeune, a Texas National Guard Supply-Sergeant was operating an army jeep and was also employed as a caretaker. Distinguishing its earlier decision in *Dover* v. *United States*, 192 F. 2d 431 (5th Cir., 1951) in which that same Court had held that a member of a State National Guard Unit, not called into active federal military service, was not an employee of the United States, the Court stated that it adhered to its former opinion, in the

Dover case, but recognized that it was not controlling in the *Elmo* case. And the distinction which the Court pointed out between the *Dover* and the *Elmo* cases is that Lejeune was not only a "member" of the National Guard, but, ". . . was also employed as a civilian unit caretaker of Company C" (p. 231).

It should be noted that the court found no constitutional inhibition in holding Lejeune a federal civil employee.

> "As to appellant's contention that the Court of Appeals for the Tenth Circuit in deciding the *Holly* case overlooked certain Constitutional limitations on the power of Congress, we think there is nothing in the Constitution inhibiting Congress from authorizing the hiring of a civilian employee to look after property belonging to the United States, assigned to a state National Guard unit" (p. 233).

In *Duncan*, an army truck, driven by Clark, struck the rear of another truck causing it to roll forward crushing Duncan between the two vehicles. The trial court found that at the time of the accident, Clark, while proceeding on a return trip from Camp Mabry, Texas, to Terrell, Texas where he had been sent to receive an Army vehicle for the Texas National Guard, was acting in the capacity of an employee of the United States, within the scope of his employment as a unit caretaker of United States government property assigned to the unit. This finding and the judgment of the trial court were affirmed on appeal.

In *Courtney*, an action was brought under the FTCA to recover damages allegedly caused by a unit caretaker of a National Guard unit. The court stated, page 113:

> "The sole issue on these appeals is whether a civilian caretaker employee of a federally recognized but non-activated National Guard unit is an 'employee' of the United States within the meaning

of the Federal Tort Claims Act, 28 U. S. C. A. §1346(b)."

In that case, Truex was a civilian caretaker of federal equipment loaned to the federally recognized, but non-activated, New York National Guard. The claims for damages arose out of his alleged negligent conduct in the operation of a Tank Retriever M-32. After pointing out that Truex was employed under 32 U. S. C. §42 (now 32 U. S. C. §709), which authorizes the employment of technician caretakers, under regulations of the Secretary of the Army, for the care and maintenance of United States property assigned to National Guard organizations, and after referring to National Guard Regulation No. 75-16, the court held, page 113:

> "The adjudicated cases appear to be unanimous in treating caretaker employees of non-activated National Guard units as 'employees' within the meaning of the Act. . . . However, these same courts hold that *members* of such units are not 'employees' within the Act."

The court stated further that it agreed with the decisions in *Holly, Elmo* and *Duncan.*

Martarano v. *United States,* 231 F. Supp. 805 (D. C. Nevada, July, 1964) is also applicable. This was an action against the United States based upon negligence under the FTCA. The alleged "employee", Sweeney, was employed by the Nevada Personnel Department for employment as Mammal Control Agent. Sweeney's wages were paid by the State of Nevada and his retirement plan was under the State of Nevada. But he was supervised by federal officials of the Fish and Wild Life Service. The court in ruling against the government held (pp. 807-808):

". . . the controlling principle is that responsibility follows right of supervision . . ." (citing cases).

"It is true that a determination of Sweeney's employment status, that is, whether he was a federal employee at the time of the collision, presents a question of federal rather than state law. . . . This does not mean, however, that only a person officially on a federal payroll may come within the definition of federal employee. The usual rules of *respondeat superior* are to be applied. This is plainly recognized by the statutory definition of employee of the government by apt words encompassing persons 'acting on behalf of a federal agency', temporarily or permanantly, 'whether with or without compensation.' "

To same effect, *Watt* v. *United States*, 123 F. Supp. 906 (N. D. Ark. 1954). See also Wright: *The Federal Tort Claims Act*, Central Book Company, Inc. 1957, p. 47.

In *O'Toole* v. *United States*, 206 F. 2d 912 (3rd Cir. 1953), the Court reversing the decision below, held that a military member of the District of Columbia National Guard was an employee of the United States within the meaning of the FTCA, even though it was not activated, citing the *Holly* and *Duncan* cases.

However Judge Smith preferred to rely upon *Williams* v. *United States*, 189 F. 2d 607 (10th Cir. 1951); *Dover* v. *United States*, 192 F. 2d 431 (5th Cir. 1951); *McCranie* v. *United States*, 199 F. 2d 581 (5th Cir. 1952), cert. den. 345 U. S. 922; *Storer Broadcasting Company* v. *United States*, 251 F. 2d 268 (5th Cir. 1958), cert. den. 356 U. S. 951; *Pattno* v. *United States*, 311 F. 2d 604 (10th Cir. 1962), cert. den. 373 U. S. 911. But none of these cases involved persons who were in fact civilian caretakers of federal properties as in the *Holly* line of decisions and as here. In the *Storer* case the court particularly noted this "caretaker" distinction.

In *Pattno*, which may be stressed by the defendant, the Circuit Court affirmed the findings of the Court below. The facts and the applicable law are readily distinguishable from the instant case. There, a mid-air collision between a Wyoming Air National Guard jet flown by Capt. Meckem and a private plane resulted in the death of Lewis, the private plane pilot. In a wrongful death action brought against the United States under the FTCA, recovery was denied by the trial Court on the ground that "the accident was not caused by the negligence of an employee of the United States while acting within the scope of his employment." The case turned upon the duties and scope of Captain Meckem. Lt. Anderson and Capt. Meckem were members of the non-activated Wyoming Air National Guard. Meckem was employed as an air technician flight-instructor pursuant to 32 U. S. C. §709, but not in a maintenance or caretaker capacity as to U. S. property and had no caretaker duties. Although Captain Meckem drew pay as an air technician, it is there that the superficial resemblance to McCoy ends. Captain Meckem's civil and military duties were concerned only with the military flight training of Air National Guardsmen and he was engaged solely in a military training formation flight, which was so found by the trial court and found further to have nothing to do with care or maintenance of the aircraft.

In its brief to the Appellate Court, in the *Pattno* case, the United States took great pains to make clear that Captain Meckem was not a "caretaker", and "had nothing whatever to do with the maintenance or care of government property used by the Air National Guard", and quoted the trial judge's holding that Captain Meckem "was not a caretaker within the meaning of the Act." Its brief then went on to say: "This holding, and the facts of this case place

it beyond the rule of *Holly* and similar cases." (Citing *Wendt, Courtney, Elmo, Duncan* and *Watt.*)

Judge Smith's resort to the historical and constitutional background is not well founded and is irrelevant in any event. He relied upon this in rejecting the "caretaker" distinction between the two lines of cases. His basic ground was that "The Maryland Air National Guard, although federally recognized, was an independent military force of the State of Maryland under the command jurisdiction of the Governor ——" citing the Maryland constitution and code and the National Guard Act, 32 U. S. C. §314, with particular focus on the role allegedly played by the Adjutant General of the Maryland Air National Guard. Judge Smith also cited *Harris* v. *Boreham*, 233 Fed. 2d 110, which is not apropos.[2] (But see *Holly* and *Meyer*, *supra*, on this point.)

It is respectfully submitted that Judge Smith's analysis disregards the basic federal statutory and regulatory structure and the supporting facts heretofore alluded to, and misconstrues the letter and spirit of the National Guard Act, while at the same time endowing the Maryland statutes (referring to the National Guard) with greater scope than can be reasonably attributed thereto. To begin with, the mere fact that under 32 U. S. C. section 702 (d) and section 710 the State bears a responsibility for the destruction of property by members of its State National Guard does not change the picture of federal ownership and the maintenance of its property by its highly trained civil techni-

[2] This case involved an action against the United States for personal injuries allegedly caused by a loose manhole cover in a street in St. Thomas, Virgin Island. The court held that the municipality of St. Thomas was not a federal agency of the United States; that the territory of Virgin Island was endowed with separate sovereign attributes granted by Congress and was a body politic distinct from the United States government.

cians, under such regulations as the secretary of the air force may prescribe (§709(c)).

The Federal Statute (32 U. S. C. Sec. 709), the Air Force Regulations (ANGR 40-01), and the ANG Manual (40-01) demonstrate that the Federal government and not the State of Maryland had the power and right to employ, fix rates of pay, establish work hours, supervise, and discharge the caretakers. Ultimate authority to control all aspects of the employment relationship with respect to caretakers is vested in the United States. These federal enactments and regulations establish that caretakers are employees of the United States. The United States delegates to the State Adjutants General, by virtue of ANGR 40-01 and related orders and regulations, this authority, in behalf of the United States, to employ, fix pay scales, establish work hours, supervise, and discharge civilian caretakers of federal property. The exercise of this authority so delegated by the United States to the State Adjutants General remains subject to control and limitation by the United States through further regulations and instructions issued by the Chief of the National Guard Bureau (ANGR 40-01), Sec. 1, paragraph 3(b) (R. 658). (*Holly, supra,* p. 35). The Maryland Codes pertaining to the National Guard are merely perfunctory and clearly subservient to the overriding Federal structure. (Appendix, p. A-15). Under Art. 65, Sec. 11 of the Annotated Code of Maryland (Appendix, p. A-15) the ultimate responsibility of the quartermaster general is to the Secretary of the Army to whom he must submit "returns of all federal property" as prescribed by said Secretary. Section 15(b) of the code specifically recognizes that the Air National Guard of Maryland shall consist of those units of the organized militia allocated to the State of Maryland by the Department of Defense.

Furthermore, an examination of Article 65 reveals that the State of Maryland itself recognizes its minor and nominal role in the National Guard when it provides under Section 62 for its own "Maryland State Guard" separate and apart from the National Guard.

> . . . "Such forces shall be additional to and distinct from the National Guard and shall be known as the 'Maryland State Guard.'" (Appendix, p. A-16).

See *United States* v. *Herting*, 48 F. Supp. 607 (D. C. S. D. Fla. 1943) in which the court noted that defendant was a member of the Maryland State Guard organized under Maryland law in 1943, and that it was a separate military organization from that of the National Guard.

As was held in the Meyer case:

> ". . . *The functions lodged by the United States in the State Adjutant General did not serve to supplant this right of control in the United States,* though it may be said to have been ancillary thereto. Such supervision as was lodged in the State did not make Captain McCoy an employee of Maryland. A foreman, for example, is not the employer of the one whose work he may in some respects supervise. There is of course a close relationship between the State of Maryland and the United States in the maintenance of federal property allocated to the Maryland National Guard, but this does not tip the balance toward the State on the issue of employment; *for too much begins and remains with the United States* in the case of these caretakers of federal property." (Emphasis supplied)

It may be added that Judge Smith also sought support from an alleged resemblance of government support of the National Guard to state aid such as in the Federal Highway Act. It is respectfully submitted that mere financial assis-

tance without the many other factors involved as in this case far from parallels the situation herein.

Defendant's legislative history argument.

The defendant has contended that there was an intention on the part of Congress not to include caretakers as employees of the government within the purview of the FTCA. This legislative history on the contrary demonstrates the Federal control of the National Guard and, more particularly of "Caretakers." Congress had many opportunities both before, at the time of the passage of FTCA, and, thereafter, to indicate its intention that "caretakers", were State employees if it chose to do so. As a matter of fact, since FTCA became a law in 1946, Congress has several times amended this Act, but has remained silent as to "caretakers" even in the face of the long lines of cases on the subject from 1951 to date. Obviously, Congress did not intend to remove "caretakers" from their recognized Federal status. Nor is recent congressional legislative history helpful to the defendant, as the court in *Meyer* noted. There Judge Fahy said (p. 1013):

> "The United States contends that Congress, since the events in this case, has rejected the effort to extend the coverage of the Federal Tort Claims Act to members and civilian employees of the National Guard. Reliance for this contention is placed upon 74 Stat. 878 (1960), 32 U. S. C. §715 (Supp. 1962) and its history, including H. R. Rep. No. 1928, and S. Rep. No. 1502, 86th Cong., 2d Sess. (1960), U. S. Code Congressional and Administrative News p. 3492 *et seq.* We can by no means agree with this contention insofar as it bears upon the status of persons employed as civilians under 32 U. S. C. §709. The Government's reference in its brief to the statement in the letter of the Deputy Attorney General to the Chairman of the Senate Committee

on the Judiciary, set forth in the Report, 'To divorce responsibility from control is to forego any rational legal basis for payment,' clearly misses the significance of the position of the Deputy Attorney General insofar as the present case is concerned. The thrust of his objection to the proposed legislation, S. 1764, 86th Cong., 2d Sess. (1960), which would have amended the Tort Claims Act as to both classes of persons, was that it would change existing law as to federal liability for acts of Guardsmen when on regular training duty under State control. As to the provision expressly including civilian caretakers under the term 'employees of the Government,' his position was that it was unnecessary because it would merely restate existing law.[4]

"This distinction between members of the National Guard and men employed pursuant to Section 709 appears also in the *Hearings Before Subcommittee No. 2 of the House Committee on the Judiciary,* 86th Cong., 2d Sess. Ser. 22 (1960), where the First Assistant, Civil Division, Department of Justice, with reference to Section 709 employees, made a statement in terms identical to those used by the Deputy Attorney General. *Id.* at 6 and 7. See note 4, *supra.*"

Judge Fahy further noted that the new statute, 74 Stat. 878, 32 U. S. C. §715 (Supp. 1962) did not detract from the remedies under the FTCA but merely "creates a limited administrative recovery [up to $5,000] as an alternative to the traditional judicial one under the Federal Tort Claims Act" (p. 1014).

The court is respectfully referred to footnotes 4 and 5 to Judge Fahy's opinion which cites the statements of the Deputy Attorney General and the Secretary of the Army, as supporting his views.

It is of sufficient importance here to quote the statement of the Deputy Attorney General as footnoted by Judge

Fahy. The Deputy Attorney General, also apparently referring to the *Holly* line of decisions, observed that he found the government's liability for acts of federalized National Guardsmen and section 709 employees as the same:

> The same rationale that looks to the controlling organization holds that when National Guardsmen are actually under the control, in whole or in part, of regular Army or Air Force officers or other Federal personnel, the Government is liable for their negligence. In such instances, however, the proposed legislation would be unnecessary, for the Government's responsibility already exists under the present provisions of the Federal Tort Claims Act.
>
> The provision which would expressly include within the definition of "employee of Government," civilian employees of the National Guard who perform caretaker functions with respect to the National Guard's military equipment, and are separately paid for such services under title 32, United States Code, section 709, is also unnecessary and thus objectionable, for the same reason. For it has already been held under the principles we have discussed in an unbroken series of court decisions that, because of the control relationship between such persons and the Federal Government (and its property), the latter is responsible for their torts under the present provisions of the Federal Tort Claims Act. (Senate Report, No. 1928.)

Judge Fahy said further:

> "However that may be, it is clear that as of the time here in question, 1958, the plaintiffs' remedy for injuries caused by civilian caretakers was under the Federal Tort Claims Act; and the history of this subsequent legislation supports this view. The fact that this caretaker was also an officer of the National

> Guard with other duties in that respect did not remove him from the federal employee status while he was actually performing the duties incident to that status" (p. 1014).

B. McCoy was acting within the scope of his civilian employment as a technician-caretaker at the time of the accident.

A fair analysis of the evidence discloses that McCoy was flying either solely in his civilian air technician status or, as conceded by the United States, in a dual capacity (as a civilian air technician and as a military pilot) at the time of the accident (R. 79, 80, 118, 587, 588), that he was then doing the work of an air technician in a supervisory maintenance position (R. 70, 79, 80, 121, 137, 138, 139, 140); that McCoy was not in a flying training period at the time of the accident (R. 80, 121, 136, 146, 147, 152-153, 161-163, 167, 586, 587). In either situation under Maryland Law the United States would be liable.

It is clear also under Maryland law that a person may be an employee of two employers for a given act. In *Keitz v. National Paving & Contracting Company*, 214 Md. 479, 490, 491; 134 A. 2d 296, 301 (1957), the court said:

> "A person may be the servant of two masters, not joint employers, at one time as to one act, provided that the service to one does not involve abandonment of the service to the other. *Baur* v. *Calic*, 166 Md. 387, 171 A. 713; restatement of the Law of Agency, Sec. 26 . . ."

The issue of agency and master-servant and scope of employment is to be determined in this case in accordance with Maryland law. *Williams* v. *United States*, 350 U. S. 857. The Maryland law applicable to motor vehicles on land is made applicable to aircraft. Article I-A, section

10 of the Maryland Code (Appendix, A-15). The evidence that the United States owned the airplane operated by McCoy gave rise to a presumption under Maryland law that McCoy was the agent or servant of the United States, acting in the course of his employment by the United States at the time of the happening of the accident in question. There being no evidence to the contrary on the issue of agency in the case, the plaintiffs would be entitled to a verdict against the United States as a matter of law. Indeed, the only testimony on the issue of agency buttressed this important presumption to which the plaintiffs were entitled. McCoy and his superior, Kilkowski, who was also employed pursuant to Section 709, Title 32, U. S. Code, *testified* that at the time of the accident McCoy was performing the duties of his civilian employment by the United States.

The foregoing is reinforced by the various admissions of the United States previously adverted to.

Under Maryland law, there is a strong, although rebuttable presumption that the operator of a vehicle is the agent or servant of the owner thereof. *Keitz* v. *National Paving & Contracting Company*, 214 Md. 479, 134 A. 2d 296 (1957); *Fowser Fast Freight* v. *Simmont*, 196 Md. 584, 598, 78 A. 2d 178, 179 (1951); *Taylor* v. *Freeman*, 186 Md. 474, 47 A. 2d 500 (1946); *Pennsylvania R. R.* v. *Lord*, 159 Md. 518, 151 A. 400 (1930).

Under the law of Maryland, it is also presumed that the agent or servant was operating the vehicle within the scope of his employment. The presumption may also be rebutted. *Brown* v. *Bendix Aviation Corporation*, 187 Md. 613, 621, 622, 51 A. 2d 292, 296 (1947); *Erdman* v. *Horkheimer*, 169 Md. 204, 206, 207, 181 A. 221 (1935).

In *Safeway Trails, Inc.* v. *Smith*, 222 Md. 206, 159 A. 2d 823 (1960), the Court, in discussing the presumption of agency, stated, 159 A. 2d 828, 829:

> "We have consistently held that if the evidence to rebut the presumption of agency from ownership is controverted and is not conclusive, the jury must decide the issue. (Citations omitted.) It was pointed out in *Grier* v. *Rosenberg*, 213 Md. 248, 255, 131 A. 2d 737, 740, that whether the evidence in rebuttal of the presumption is so slight that it is insufficient for the consideration of the jury or so conclusive as to require a directed verdict for the defendant 'must depend upon, and be decided by, the facts developed in each individual case'."

See also *Scott* v. *James Gibbons Co.*, 192 Md. 319, 64 A. 2d 117 (1949).

In *Grier* v. *Rosenberg*, 213 Md. 248, 131 A. 2d 737 (1957), the decisive test, the Court stated, is whether the employer has the *right* to control and direct the servant in the performance of his work and in the manner in which the work is to be done, *not whether he exercised* that right. See also *Sun Cab Company* v. *Powell*, 196 Md. 572, 578, 77 A. 2d 783 (1951); *Charles Greeland and Sons, Inc.* v. *Couplin*, 211 Md. 160, 169, 170, 126 A. 2d 606 (1956).

C. The majority's finding that McCoy was engaged in a military "training flight", contradicts the findings of the district court below and in *Meyer* and is unsupported by the evidence.

But the majority below took the unusual step of making a new finding of fact that McCoy was acting solely in his military capacity as an officer of the Maryland Air National Guard and not in his civilian capacity. In setting aside the finding of the trial court on that issue of fact, Judge Smith took the position that he was not bound by Rule 52(a), Federal Rules of Civil Procedure, which provides that:

> "Finding of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

The findings of fact of the trial court ordinarily will not be disturbed unless clearly erroneous. *International Boxing Club* v. *United States*, 358 U. S. 242, 252 (1958); *United States* v. *United Steelworkers of America*, 271 F. 2d 676, 3rd Cir. aff'd 361 U. S. 39 (1959).

However, Judge Smith held that Rule 52(a) was not "applicable on the present appeal" because the actions were submitted to the trial court on the record made "in the consolidated trial of related cases", in the District of Columbia, and the reviewing court was therefore (R. 723):

> "* * * in as good a position as was the trial court to evaluate the evidence, draw the inferences of which the evidence is reasonably susceptible, and decide the critical questions raised on this appeal."

In fact, the United States District Court for the District of Columbia was in the best position to evaluate the testimony of the witnesses because it was in that Court that the witnesses had appeared and testified. Rule 52(a) was binding on the District of Columbia Court of Appeals. It was no less binding on the Third Circuit Court of Appeals which was one step further removed from the trial.

D. The certification and adjudication by agencies of the United States as admissions against interest.

Although these admissions may not be conclusive as Judge Smith pointed out, it is nevertheless respectfully submitted that they were disregarded and that they are of sufficient strength and scope as to render even more questionable the contrary and new findings of fact made by the majority below.

Subsequent to the occurrence, Captain McCoy received benefits under the provisions of the Federal Employees' Compensation Act pursuant to certification by the U. S. Department of Labor. The act provides:

> "The United States shall pay compensation as hereinafter specified for the disability or death of an *employee* resulting from a personal injury sustained *while in the performance of his duty . . .*" 5 U. S. C. A. Sec. 751 (Emphasis supplied).

It should be noted that had McCoy been considered to have acted as a military member of the Maryland Air National Guard at the time of this occurrence, his remedy was benefits under 32 U. S. C. A. Sec. 319 which authorizes hospital and surgical benefits and basic pay and allowance during hospitalization for a member of the National Guard who is injured in line of duty while performing an aerial flight. But under the supervision of his superior, Col. Kilkowski, his compensation claim was made as a civil employee of the United States under 5 U. S. C. §751 (*supra*, p. 18).

Lt. Col. Irvin Ebaugh, United States Property and Fiscal Officer for the State of Maryland, a federal employee, processed the papers for Captain McCoy's compensation claim (R. 250-251). These forms were provided by the Department of Labor and used in all instances for technicians (R. 241). The McCoy claim was duly processed and approved by the U. S. Department of Labor (*supra*, p. 18).

The fact that the United States took an assignment from Captain McCoy (R. 227) also indicates that he was regarded by the United States as an employee of the Government at the time of the occurrence.

Donald A. Chalmers, the passenger in the T-33 who was killed, was also required to sign a release to the United

States prior to the flight (R. 689). Since the State of Maryland had sovereign immunity, the only purpose of such a release would be to negate liability on the part of the United States. The second sentence in the second paragraph of this release reads as follows:

> "It is further understood and agreed that this release, among other things, extends to and includes negligence, *faulty pilotage* and structural failure of the aircraft thereof." (Emphasis supplied.)

And there are the additional admissions by the United States in its briefs that McCoy was at least in part engaged in his civilian capacity at the time (*supra*, p. 20).

II.

Assuming, but not admitting, McCoy was engaged in some military duties at the time of the occurrence, the United States is nevertheless liable.

As was stated by Judge Staley in the dissenting opinion below (p. 732):

> ". . . On this question, historical and constitutional considerations as to the status of members of the National Guard are simply not relevant. For we are concerned with the status of Captain McCoy, not as a member of the National Guard, but as a civilian caretaker or air technician employed under 32 U. S. C. Sec. 709(a) 'to care for material, armament, and equipment of the Air National Guard * * *' which is property of the Federal Government."

Even if McCoy had been engaged in a dual role at the time, the ownership and control with respect to the use of

its plane, its fueling, operation and flight area were all exerted, specified and supplied by the United States and through its agency the United States Air Force, its officers and its published rules and regulations nevertheless establishes its *respondeat superior* liability under the FTCA.

The FTCA provides that the United States shall be liable "if a private person" would be liable to the claimant in accordance with the law of the place where the act or omission occurred, 28 U. S. C. §1346(b); and see *Gilroy* v. *United States*, 112 F. Supp. 664 (D. D. C. 1953), wherein the meaning to be given to the words, "private person," is discussed. See also *O'Toole* v. *United States*, *supra*, p. 42.

In the statement of facts herein, the position of the Air National Guard as a part of the U. S. Air Force structure and national defense organization was outlined. As Secretary of the Army Brucker, on May 10, 1960, advised the Committee on the Judiciary of the House of Representatives, H. Rept. 1928, 86th Cong. 2d Sess., p. 7:

> "Equipment such as jet aircraft, tanks, and heavy artillery, . . . would seldom if ever be useful in accomplishing a State mission."

It is hardly realistic to characterize the 104th fighter squadron as anything but a part of the national defense. The over-all purpose of the National Guard is to be a part of the defense forces of the United States as a whole 32 U. S. C. Sec. 102 (*supra*, p. 21).

The organization of the Air National Guard and the composition of its units is the same as that prescribed for the United States Air Force, subject, in times of peace, to such general exception as the Secretary of the Air Force may authorize, 32 U. S. C. Sec. 104(b). The organization may not be disbanded without the consent of the Presi-

dent of the United States, and the actual strength of such organization in commissioned officers and enlisted members may not be reduced below minimum strength prescribed by the President, 32 U. S. C. Sec. 104(f).

The National Guard Bureau, an agency of the United States acts for the Secretary of the Air Force in the supervision of the uniform training of the units to conform with procedures prescribed by the Secretary of the Air Force. The National Guard Bureau is located in the Pentagon, and its ranking officers are on active duty with the United States Air Force (Wilson, R. 309-310).

The Constitutional provision that the states shall have the authority to appoint commissioned officers in the National Guard is in practical, if not legal, effect, nominal. An applicant is interviewed by a board appointed by the Secretary of the Air Force, and if found satisfactory, his application is processed through the National Guard Bureau of the Secretary of the Air Force from whom he receives his Air National Guard of the United States appointment and his federal recognition, (Wilson, R. 288-289), and is thereafter subject to federal approval (R. 300). Delegation of authority does not mean surrender of authority. Nor does lip service alter the fact that the real ownership, control and financing down to the last detail is in the United States.

In *Layne* v. *U. S.*, 295 F. 2d 433 (7th Cir. 1961, cert. den. 368 U. S. 990), it was held that a member of the National Guard, not a caretaker, killed while solely on a military training mission as part of a unit which had not been activated, was an employee of the United States. However recovery was denied on the ground that a serviceman cannot recover damages from the government for injuries which are incidental to the service. See also: *U. S. ex rel Gillett*

v. *Dern*, 74 F. 2d 485 (D. C. Cir. 1934). See *Holly, supra*, p. 38.

In *United States ex rel Gillett* v. *Dern*, 74 Fed. 2d 485, a U. S. Army veteran already receiving a U. S. Military pension sought additional benefits from the United States by means of his membership in the New York National Guard. The Court held that these benefits were in effect mutually exclusive since they were made alternative, both coming from the same source. As a consequence of Gillett having elected not to surrender his federal pension, the Secretary of War withdrew his federal recognition as a National Guard officer. The Court recognized that this meant effective termination of Gillett's status as an officer of the National Guard by the federal government, which was held to be within its powers (p. 488):

> "If it happens that by reason of that action he is embarrassed in or prevented from performing his duties as a National Guard officer, the fact in either case flows from the exercise of a power which is not subject to challenge here."

The source of federal power is clearly stated in the Constitution of the United States which provides in pertinent part:

> "Art. I, Sec. 8. The Congress shall have Power
> * * *
> To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress; * * *"

In any event there is no constitutional provision with respect to caretakers of federal property.

III.

The prior *Meyer* decision operated as a collateral estoppel.

The Doctrine of Collateral Estoppel, it is respectfully submitted, should be considered by this Court as applicable against the government here. In the *Meyer* companion case (decided by the District of Columbia Court of Appeals, June 13, 1963), judgments on the common issue of liability became final when the U. S. Supreme Court denied certiorari on December 16, 1963.

In each instance a copy of the *Meyer* decision was immediately filed with the Court by plaintiffs in connection with the appeal below. It is respectfully submitted that the government became collaterally estopped on the issue of liability by the final judgment in the *Meyer* case several months before the decision below. In *United States of America* v. *Willard Tablet Co.*, 141 F. 2d 141, 144 (C. A. 7, 1944) the court said: "The doctrine of res adjudicata is not dependent upon mutuality of estoppel by Judgment, as contended by the government." See also *Coca-Cola Co.* v. *Pepsi-Cola Co.*, 172 A. 260, 36 Del. 120 (1934); 30A Am. Jur. Sec. 393, p. 444; *The City of Lincoln*, 25 Fed. 835, 843 (S. D. N. Y. 1885).

Public policy favors an end to litigation, particularly where as here, the United States has had its full and complete day in court and exactly the same facts and issues have been completely litigated and decided against it in the District of Columbia. It is respectfully submitted that the United States is as bound by the *Meyer* decision in the *Levin* cases as though such facts and issues have been physically tried in the *Levin* case. In fact it did not

matter at any time within the issues herein who the nominal plaintiffs were. For all practical purposes the plaintiffs could be nameless or faceless. Article IV, Section 1 of the United States Constitution; *Davis* v. *Davis*, 305 U. S. 321; *Chicago Life Insurance Co.* v. *Cherry*, 244 U. S. 25; *Baldwin* v. *Iowa State Travelling Mens Ass'n.*, 283 U. S. 522.

Conclusion.

It is respectfully submitted that the "circumstances" are such that the "United States", like "a private person" is liable pursuant to the FTCA under the law of Maryland "where the act occurred." McCoy was employed, supervised and controlled by the United States under the federal caretaker statute, Section 709, and subsidiary federal regulations, as a federally trained air technician to maintain aircraft owned and maintained by the United States as part of its national defense. Add to this the strong and unrebutted *respondeat superior* presumptions of the law of Maryland, the supporting structure of basic facts and that the defendant offered no evidence of any substance to the contrary.

The conclusion is compelling that at the time of the accident, McCoy was a civilian employee of the United States acting within the scope of his employment as a civilian maintenance technician and that he operated the subject aircraft within the scope of such employment.

The judgments of the Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted,

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Pertinent Provisions of the Federal Tort Claims Act.

(Title 28, United States Code):

§ 1346. *United States as defendant.*

"(b) Subject to the provisions of chapter 171 of this title, the district courts, * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

§ 2671. *Definitions.*

As used in this chapter and sections 1346 (b) and 2401 (b) of this title, the term . . .

". . . 'Employees of the government' includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation."

National Guard, 32 U. S. C. (Pertinent Provisions).

SECTION 102. *General policy.*

In accordance with the traditional military policy of the United States, it is essential that the strength and organization of the Army National Guard and the Air National Guard as an integral part of the first line defenses of the United States be maintained and assured at all times.

National Guard, 32 U. S. C. (Pertinent Provisions).

Whenever Congress determines that more units and organizations are needed for the national security than are in the regular components of the ground and air forces, the Army National Guard of the United States and the Air National Guard of the United States, or such parts of them as are needed, together with such units of other reserve components as are necessary for a balanced force, shall be ordered to active Federal duty and retained as long as so needed. Aug. 10, 1956, c. 1041, 70A Stat. 597.

SECTION 314. *Adjutants General.*

(d) The adjutant general of each State and Territory, Puerto Rico, the Canal Zone, and the District of Columbia, and officers of the National Guard, shall make such returns and reports as the Secretary of the Army or the Secretary of the Air Force may prescribe and shall make those returns and reports to the Secretary concerned or to any officer designated by him. Each Secretary shall send with his annual report to Congress an abstract of the returns and reports of the adjutants general and such comments as he considers necessary for the information of Congress. Aug. 10, 1956, c. 1041, 70A Stat. 604; Sept. 2, 1958, Pub. L. 85-894, 72 Stat. 1713.

SECTION 318. *Compensation for disablement during training.*

A member of the National Guard is entitled to the hospital benefits, pay and allowances, pensions, and other compensation provided by law or regulation for a member of the Regular Army or the Regular Air Force, as the case may be, of corresponding grade and length of service, whenever he is called or ordered to perform training under section 502, 503, 504, or 505 of this title—

(1) for a period of more than 30 days, and is disabled in line of duty from disease while so employed; or

(2) for any period of time, and is disabled in line of duty from injury while so employed. Aug. 10, 1956, c. 1041, 70A Stat. 605; Sept. 2, 1958, Pub. L. 85-861, Sec. 33(c)(1), 72 Stat. 1567.

SECTION 501. *Training generally.*

(a) The discipline, including training, of the Army National Guard shall conform to that of the Army. The discipline, including training, of the Air National Guard shall conform to that of the Air Force.

(b) The training of the National Guard shall be conducted by the several States and Territories, Puerto Rico, the Canal Zone, and the District of Columbia in conformity with this title. Aug. 10, 1956, c. 1041, 70A Stat. 609.

SECTION 710. *Reports of survey.*

(a) All military property issued by the United States to the National Guard remains the property of the United States.

(b) If property issued to the National Guard is lost, damaged, or destroyed, or becomes unserviceable or unsuitable, a survey of the circumstances thereof shall be made by a disinterested commissioned officer of the Regular Army or the Army National Guard detailed by the Secretary of the Army, or by a disinterested commissioned officer of the Regular Air Force or the Air National Guard detailed by the Secretary of the Air Force, as the case may be. The report of the surveying officer shall be sent to the Secretary concerned or to an officer designated by him to receive those reports.

(c) The Secretary concerned or his designated representative may relieve the State or Territory, Puerto Rico, the Canal Zone, or the District of Columbia, whichever is concerned, of further accountability and pecuniary liability for the property. However, if it was lost, damaged, or

destroyed through negligence, the money value of the property or the damage thereto shall be charged (1) to the State or Territory, Puerto Rico, the Canal Zone, or the District of Columbia, whichever is concerned, to be paid from its funds or from any non-Federal funds; or (2) to the member to whom the loss, damage, or destruction is charged from pay due him for duties performed in his status as a member of the National Guard.

(d) If property surveyed under this section is found to be unserviceable or unsuitable, the Secretary concerned or his designated representative shall direct its disposition by sale or otherwise. The proceeds of the following under this subsection shall be deposited in the Treasury under section 725c(b)(22) of title 31:

(1) A sale.

(2) A stoppage against a member of the National Guard.

(3) A collection from a person, or from a State or Territory, Puerto Rico, the Canal Zone, or the District of Columbia, to reimburse the United States for the loss or destruction of, or damage to, the property.

(e) If a State or Territory, Puerto Rico, the Canal Zone, or the District of Columbia, whichever is concerned, neglects or refuses to pay for the loss or destruction of, or damage to, property charged against it under subsection (c), the Secretary concerned may bar it from receiving any part of appropriations for the Army National Guard or the Air National Guard, as the case may be, until the payment is made.

(f) Instead of the procedure prescribed by subsections (b)(d), property issued to the National Guard that becomes unserviceable through fair wear and tear in service may, under regulations to be prescribed by the Secretary concerned, be sold or otherwise disposed of after an inspection,

and a finding of unserviceability because of that wear and tear, by a commissioned officer of the Regular Army or the Regular Air Force, as the case may be, designated by the Secretary. The State or Territory, Puerto Rico, the Canal Zone, or the District of Columbia, whichever is concerned, is relieved of accountability for that property. Aug. 10, 1956, c. 1041, 70A Stat. 615; Sept. 2, 1958, Pub. L. 85-861, Sec. 33(c), 72 Stat. 1567.

Excerpts from Plaintiff's Exhibit 15, National Guard Regulations No. 75-16 (Dated December 29, 1947) (R. 634 to 645).

1. *Authority*: Accounting clerks and caretakers referred to in these regulations are employees authorized under the provision of section 90, National Defense Act, for the administration and care of material, armament, vehicles, and equipment provided for the National Guard and used solely for military purposes. The Secretary of the Army has delegated to the several adjutants general of States, Territories, and the District of Columbia, authority to employ, fix rates of pay, establish duties and work hours (not to exceed 40 hours per week), and to discharge employees within the purview of this regulation; subject to the provisions of law and such instructions as may from time to time be issued by the Chief, National Guard Bureau. (R. 635).

2. *Definitions*: The following definitions are applicable:

b. *Caretakers* (Army) are male, civilian employees authorized as supervisors, mechanics, and technicians. They may be divided into two main categories.

(1) *Unit Caretakers*: Employees who work directly under the supervision of a company or similar unit

commander and are responsible to that commander for the care, maintenance, and repair of the unit equipment.

(2) *Pool Maintenance Caretakers*: Employees who work in or from fixed shops, under the direction of shop or pool supervisors and under the general supervision of the State maintenance officer. They are responsible for the inspection, repair, and reconditioning of equipment pertaining to National Guard organizations (R. 635).

c. *Caretakers* (Air) are male civilian employees authorized by law for maintenance, repair, and inspection of equipment issued to the National Guard Air units.

3. *Number:* The number of accounting clerks and caretakers authorized to be paid from Federal funds in each State will be announced periodically by the Chief, National Guard Bureau. This number will be based on geographic considerations, troop strengths, the amount and types of equipment issued to the State, and upon funds made available for the National Guard. The number of personnel actually paid from Federal funds may exceed the total specified from time to time by the Chief, National Guard Bureau, if employment is on a part-time basis and funds allotted for each job are not exceeded (R. 636).

4b. *Caretakers (Army)*

(1) *Unit caretakers* must be members of the National Guard and of the unit for which employed. They must be qualified to perform maintenance, at the organization level, on the equipment for which the unit commander will be responsible. Such qualifications will be determined by appropriate aptitude tests (R. 636).

Excerpts from Plaintiff's Exhibit 15, National Guard Regulations No. 75-16 (Dated December 29, 1947) (R. 634 to 645).

c. Caretakers (Air) must be members of the National Guard and must be able to perform the duties specified for the particular job in AAF Manual 35-0-1 "Military Personnel, Classification and Duty Assignment," 3 April 1944 (as revised) or WD TM 12-427 "Military Occupational Classification of Enlisted Personnel," 12 July 1944 (as revised). However, they may be trained in additional duties as may be required by the unit commanders. Commissioned officers of the National Guard Air Units may be employed as caretakers only in the Military Occupational Specialty positions indicated in current chart for Permanent Caretaker Detachment, National Guard Air units (R. 637).

7d. Payrolls will be certified by the bonded United States property and disbursing officer and approved by the State adjutant general or an officer designated by him (R. 639).

CHANGE No. 1

NGR 75-16, 29 December, 1947, is changed as follows:

Authority: Accounting clerks and caretakers referred to in these regulations are employees authorized under the provisions of Section 90, National Defense Act, for the administration and care of materiel, armament, vehicles and equipment provided for the National Guard and used solely for military purposes. The Secretary of the Army had delegated to the several adjutants general of States, Territories and the District of Columbia, authority to employ, fix rates of pay, establish duties and work hours, and to discharge employees within the purview of this regulation; subject to the provisions of law and such instructions as may from time to time be issued by the Chief, National Guard Bureau (R. 646).

Excerpts from Plaintiff's Exhibit 16, National Guard Regulations No. 75-16, Dated January 7, 1953 (R. 647).

1. *Purpose*: The purpose of these regulations is to outline the qualifications, duties, rights and obligations of the following personnel. (hereinafter referred to collectively as "National Guard Civilian personnel"): administrative assistants; accounting clerks; maintenance personnel; rangekeepers; and administrative, supply and maintenance technicians, and to prescribe the procedure for the payment of these individuals.

2. *Authority*: National Guard civilian personnel referred to in these regulations are employees authorized under the provisions of Section 90, National Defense Act, for administrative and accounting duties, maintenance repair and inspection of materiel, armament, vehicles and equipment provided for the National Guard and used solely for military purposes. The Secretary of the Army has delegated to the adjutants general of the several States, Territories, Puerto Rico, and the District of Columbia, the authority to employ, fix rates of pay, establish duties and work hours (a minimum of 40 hours per week), supervise and discharge employees within the purview of these regulations; subject to the provisions of law and such instructions as may from time to time be issued by the Chief, National Guard Bureau. (32 U. S. C. A. 42 and 42a; G. O. No. 96, Dept. of the Army, [illegible] Nov. 51).

3. *Definitions:* a. Administrative assistants are federally recognized officers, warrant officers or enlisted men employed as civilians to act as civilian administrative assistants to commanders in the performance of such duties, responsibilities and administrative matters for which the commanders are responsible, or may be required to perform (R. 648-649).

Plaintiff's Exhibit 17, ANGR 40-01 (R. 652).

SECTION I—*General.*

1. *Purpose*: This Regulation provides a manning guide for the Air National Guard civilian personnel program and establishes policies and procedures applicable to Air National Guard civilian personnel (R. 656).

2. *Policy*: a. Air National Guard civilian personnel shall be utilized to effect maximum efficiency in administration, supply, operations, training, and maintenance of the Air National Guard.

b. Air National Guard civilian personnel must be federally recognized members of the Air National Guard of the State, Territory, Puerto Rico, or the District of Columbia except for the employment of:

(1) Females (when specifically authorized by the Chief, National Guard Bureau).

(2) Temporary personnel paid from funds other than those designated for the pay of air technicians.

e. Airmen type air technician positions may be transferred to other units or organizations, or the position may be changed to another authorized position at the discretion of the State adjutant general, except that such positions may not be transferred to or from Headquarters, State Air National Guard without prior approval of the Chief, National Guard Bureau.

f. Officer type air technicians positions may not be transferred or changed without prior approval of the Chief, National Guard Bureau (R. 657).

h. Air National Guard civilian personnel may not accept outside employment which interferes or conflicts with the performance of their Air National Guard civilian duties.

k. Officers required to meet a Federal recognition board should not be employed prior to receipt of Federal recog-

nition, and any individual if so employed accepts such employment at his own risk. Officers exempted from meeting a Federal recognition board may be employed and paid from the date the individual is appointed. Airmen may be employed upon completion of the oaths of enlistment.

1. The authority governing matters pertaining to Air National Guard civilian personnel is contained in this regulation and will be quoted as reference in specal orders and other official action.

3. *Authority*

a. Basic authority for the employment of Air National Guard civilian personnel is contained in Section 90, National Defense Act, as amended.

b. Authority is delegated to the adjutants general of the several States, Territories, Puerto Rico, and the District of Columbia, to employ, fix rates of pay, establish work hours (a minimum of 40 hours per week) supervise and discharge employees within the purview of this regulation; subject to the provisions of law and such instructions as may be subsequently issued by the Chief, National Guard Bureau (R. 658).

5. *Definitions*: For the purpose of this Regulation:

a. "Air National Guard civilian personnel" means any and all civilians employed by the several States, Territories, Puerto Rico, and the District of Columbia, permanent or temporary, male or female, supported wholly or in part by Federal funds appropriated for that purpose, including but not limited to the following:

(1) Air technicians means a person employed for the performance of the duties of positions listed on the manning guide and paid from funds designated for the pay of air technicians (R. 659).

Excerpts from Plaintiff's Exhibit 3 (R. 210).

AIR NATIONAL GUARD MANUAL (ANGM 40-01)

CIVILIAN PERSONNEL MANUAL

1 March 1958

Department of the Air Force—National Guard Bureau
ANG Manual 40-01
Department of the Air Force
Washington, 1 March 1958

FOREWORD

The Air National Guard Civilian Personnel Manual is issued to provide staff and operating personnel with a convenient reference to the titles, grade, job number and duties of civilian personnel in the Air National Guard. Provisions are also included for the submission of recommendations for new or revised positions, grades and titles.

Provisions of this manual will govern all Air National Guard civilian employees, including those employed on a temporary hourly rate basis except those hired wholly from State or service contract funds, and will become effective as of 1 April 1958.

All Air National Guard civilian personnel will be permitted access to the contents of this manual and will be fully acquainted with the duties and responsibilities of their positions.

Recommendations or suggestions for the improvement of procedures or position descriptions of this manual are encouraged. Comments may be forwarded to National Guard Bureau, NG-AFOTP, Washington, D. C.

BY ORDER OF THE SECRETARY OF THE AIR FORCE:

EDGAR C. ERICKSON
Major General
Chief, National Guard Bureau

OFFICIAL:

JAMES E. BARBER
Colonel, NGB
Executive

Excerpts from Plaintiff's Exhibit 3 (R. 210).

DISTRIBUTION:

1 ea AG

1 ea USP&FO

4 ea Flying Detach

1 ea Non-Flying Detach

The listing below is in numerical order according to job numbers. The status indicates the position can be occupied by Officer (O), Warrant Officer (WO),* Airman (A), Female (F), and Non-Guardsman (X). The job title and career field title indicate the technician job title and corresponding Air Force career field and title. These are the new position numbers and titles; for the conversion see Section II, Paragraph 12.

MAINTENANCE SUPERVISOR

Grade: NGC-11

Job Number: 43-00

1. NATURE AND PURPOSE OF WORK:

A. *Introduction:*

The position is located in the Maintenance Division of an Air Technician Detachment. The incumbent is responsible for coordination, supervision and control within the maintenance division for aircraft maintenance, (field and organizational type), electronics, motor vehicle and support equipment. Incumbent will maintain proper administrative practices when carrying out his responsibilities, using all accepted management principles.

* An airman who is appointed warrant officer may be retained in his airman type position. A warrant officer will not be hired direct into airman type positions except into the position of Aircraft Maintenance Chief, Job Number 43-10.

Excerpts from Defendant's Exhibit 9. ANGR 50-01 (R. 671).

1. Training authority: The requirements to be met and the sources of authority for the training and instruction of the Air National Guard not in Federal service are set forth in the following:

a. Sections 5, 91, 92, 93, 94, 96, 97, and 99, National Defense Act, as amended, and Sections 201 and 501, Public Law 351, 81st Congress, hereafter referred to as Career Compensation Act of 1949.

b. Air National Guard Regulations.

c. The policies of the Department of the Air Force.

d. The orders, instruction, and training announcements issued by the Chief of Staff, United States Air Force pursuant to authority specifically delegated to him by the Secretary of the Air Force.

e. The orders and detailed instructions promulgated by the Chief, National Guard Bureau to the Air National Guard not in Federal service with the approval of the Chief of Staff, United States Air Force, in amplification of, and to make effective, the policies indicated in c above.

2. National Guard Bureau Instructions. The Chief, National Guard Bureau is charged with promulgating to the Air National Guard not in Federal Service, from time to time, the necessary orders and instructions to make effective the Department of the Air Force training policies.

a. The training of the Air National Guard will conform to the Department of the Air Force policies and directives as prescribed for the Regular Air Force.

b. It will be conducted by the Air National Guard organizations of the respective States under the supervi-

sion of the commanding generals of the appropriate major forces, in accordance with the policies prescribed by the Department of the Air Force. Such supervision will be exercised by:

1. Preparation of training directives.

2. Supervision of United States Air Force Instructors.

3. Authority to conduct inspections.

4. Conduct of tests.

5. Furnishing the Department of the Air Force with appropriate reports on state of training and recommendations for necessary remedial actions (R. 671-673).

Federal Employees Compensation Act, 5 United States Code 751.

Disability or death of employee: willful misconduct. The United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from a personal injury sustained while in the performance of his duty, but no compensation shall be paid if the injury or death is caused by the willful misconduct of the employee or by the employee's intention to bring about the injury or death of himself or of another, or if intoxication of the injured employee is the proximate cause of the injury or death. (Sept. 7, 1916, c. 457, Sec. 1, 39 Stat. 742.)

Annotated Code of Maryland, 1951, Article 1A, sec. 10 (Collision of Aircraft).

The liability of the owner of one aircraft to the owner of another aircraft, or to airmen or passengers on either aircraft, for damage caused by collision on land or in the air, shall be determined by the rules of law applicable to torts on land.

Annotated Code of Maryland—Article 65.

SEC. 11. *As Quartermaster General.*

The ranking line officer, as Quartermaster General, shall be responsible to the Governor for the care, preservation and safekeeping of all military property. He shall prepare returns of all federal military property at the time and in the manner prescribed by the Secretary of War (Secretary of the Army). He shall keep a just and true account of all expenses incurred in the upkeep of the militia and such expenses shall be audited and paid in the manner provided by law. He shall make such purchases and issue such military property as the Governor may direct. (An. Code, 1951, Sec. 11; 1939, Sec. 11; 1924, Sec. 11; 1922, ch. 490, Sec. 10; 1931, ch. 161, Sec. 11.)

SEC. 15. *National Guard:*

(b) *Of what organizations and persons National Guard shall consist.* The Army National Guard of Maryland and the Air National Guard of Maryland shall consist of those units and organizations of the organized militia allocated to the State of Maryland by the Department of Defense and supported, in whole or in part, by federal funds; and such persons as shall, with the approval of the Governor, be transferred by federal authorities for the completion of the reserve service obligation imposed upon them by federal law. Persons so transferred shall be considered members of the Army National Guard or Air National Guard, as appropriate, irrespective of whether they have executed the oath prescribed by Sec. 25.

Maryland State Guard.

SEC. 62. *Authority and name.*

Whenever any part of the National Guard of this State is in active federal service, the Governor is hereby authorized to organize and maintain within this State during such period, under such regulations as the Secretary of War (Secretary of the Army) may prescribe for the organization, standards of training, instruction and discipline, such military forces as the Governor may deem necessary; and the Governor is authorized to reduce the number of or disband such forces at any time assigned, and such able-bodied male citizens of the State, and able-bodied males of foreign birth who have declared their intentions to become citizens, resident in the State, as shall volunteer for service therein. Such forces shall be additional to and distinct from the National Guard, and shall be known as the "Maryland State Guard." Such forces shall be uniformed as the Governor may prescribe. (An. Code, 1951, Sec. 59; 1943, ch. 410, Sec. 58A.)

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Supreme Court of the United States

October Term, 1964

No. 345

STATE OF MARYLAND for the use of NADINE Y. LEVIN, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent.*

STATE OF MARYLAND for the use of SYDNEY L. JOHNS, ET AL., *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

AMICI CURIAE BRIEF IN SUPPORT OF BRIEF ON BEHALF OF PETITIONERS

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On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

AMICI CURIAE BRIEF IN SUPPORT OF BRIEF ON BEHALF OF PETITIONERS

The State of Maryland, for the use of Mary Jane Meyer, et al; the State of Maryland, for the use of Vance Lewman Brady, et al; and Capital Airlines, Inc., with leave of this Court file this, their brief amici curiae, in support of the brief of the Petitioners. The

said amici curiae are Respondents in case No. 543, *United States of America, Petitioner,* v. *State of Maryland* for the use of Mary Jane Meyer, et al., tried in the United States District Court for the District of Columbia, affirmed *United States* v. *State of Maryland*, 322 F. 2d 1009 (1963); petition for a writ of certiorari denied December 16, 1963, 375 U.S. 954; Conditional Petition for Rehearing filed by the United States out of time in June, 1964. Brady was the pilot and Meyer the copilot of the Capital Airlines airplane destroyed in the occurrence in question. The decedents, Levin and Johns, were passengers in the same airplane.

Actions were brought in the name of the State of Maryland for the survivors of Johns and Levin, passengers on the Capital Airlines plane, in the United States District Court in Pittsburgh; that Court held for the plaintiffs after the ruling of the District Court in the District of Columbia. The Government appealed and the Court of Appeals for the Third Circuit reversed in a split decision, holding for the Government (329 F (2d) 722). This decision was rendered after that of the District of Columbia Circuit Court. The Supreme Court has granted the petition of the plaintiffs for a writ of certiorari in the Johns and Levin cases.

This Court has not acted on the Conditional Petition for Rehearing which the Government moved for leave to file in the case No. 543, *United States of America* v. *State of Maryland for the use of Mary Jane Meyer, et al.,* but because the decision of this Court in the Johns and Levin cases conceivably could have a bearing on the ultimate disposition by this Court of the Conditional Petition for Rehearing in the Brady,

Meyer and Capital Airlines cases, the plaintiffs in those cases asked leave to file this brief as amici curiae in support of the brief of the petitioners, Levin and Johns, and this Court granted that prayer.

The plaintiffs in case No. 543, State of Maryland for the use of Meyer, and for the use of Brady, and Capital Airlines, hereafter, for the sake of brevity, referred to as amici curiae or the Meyer cases, believe the following questions are presented:

1. Are civilian caretakers of federal property employed on a full time basis under the authority of 32 U.S.C. § 709(a), employees of the United States under the provisions of the Federal Tort Claims Act?

2. If such civilian caretakers are employees of the United States within the meaning of the Federal Tort Claims Act (and the Government admits that McCoy was employed pursuant to the authority granted by 32 U.S.C. § 709(a)), then did the United States have sufficient right to control its said employee at the time of the occurrence in question so that the United States, if a private person, would be liable under the respondant superior law of Maryland for his negligence?

STATEMENT OF THE CASE

a. The Occurrence

The actions arose out of a mid-air collision between a Capital Airlines Viscount Airliner and a T-33 jet airplane owned and maintained by the United States and allocated to the Maryland Air National Guard. The collision occurred on Tuesday, May 20, 1958, over the State of Maryland, while the Viscount was proceeding on a regularly scheduled commercial flight from Pittsburgh to Baltimore Friendship Airport on

a civil airway. The T-33 airplane was being operated by one Julius R. McCoy on a local area flight out of Martin Airport, Baltimore, Maryland.

b. The Employment Relationship

The United States owned and provided the airplanes, paid the cost of the fuel used by all the airplanes allocated to the unit, including the T-33 Airplane involved, provided all the equipment for the Guard Unit, paid the salaries of the civilian personnel to maintain said federal property, furnished the new and spare parts required for the said equipment, and made the major repairs needed by the T-33 airplane involved and the other planes allocated to the Guard Unit.

On the date of the accident, McCoy was employed as a full-time civilian air technician under the provisions of 32 U.S.C. § 709(a), which provides for the employment of civilian caretakers of United States property. He was also a commissioned officer in the Air National Guard of the State of Maryland.

The Federal Government found it necessary to employ civilian personnel to protect and maintain its property which was allocated for use by National Guard Units. This included materiel, armament and equipment, and in the present case, the airport, hangars, runways, jet airplanes, trucks, etc.

The National Guard Bureau is authorized to regulate employment and rates of compensation of civilian caretakers of federal property; Department of the Army General Order 96, dated November 9, 1951, 32 U.S.C. § 32 (which became 32 U.S.C. § 709(a)).

Pursuant to 32 U.S.C. § 709(a), the Secretary of the Air Force, through the National Guard Bureau, pro-

mulgated Air National Guard Regulation 40-01, dated 20 December, 1954 (hereinafter referred to as ANGR 40-01), which provided that the basic authority for employment of National Guard civilian personnel is contained in Section 90 of the National Defense Act, as amended (which became 32 U.S.C. § 709(a)). This authority of the federal government to employ, fix rates of pay, establish work hours, supervise and discharge employees, within the purview of this regulation, was delegated by the Secretary of the Air Force to the Adjutants General of the several states, subject to provisions of law and such instructions as might be subsequently issued by National Guard Bureau. ANGR 40-01 and Air National Guard Manual 40-01, designated the jobs in the air technician categories and prescribed the duties and requirements of the job and the prerequisite training for such employment (R. 655-660; District Ct. Finding 5, R. 693).

Under the authority of ANGR 40-01, the National Guard Bureau promulgated Air National Guard Manual 40-01, dated 1 March 1958 (hereinafter referred to as ANGM 40-01), which states that its provisions will govern all Air National Guard civilian employees (R. 211). Said manual further provides that the "authority of the National Guard Bureau to regulate the employment and rates of compensation is contained in Department of the Army General Order 96, dated 9 November, 1951, subject, 'Delegation of Authority for the Employment and Fixing of Salaries for All Caretakers and Clerks in the National Guard Bureau'" (R. 214; Dist. Ct. Finding 6, R. 693).

Air technicians such as McCoy are full-time civilian personnel who are placed at National Guard installations by authority of federal statutes and regulations

to maintain federal property (including highly complex and valuable jet aircraft) and records, to the prescribed standards of the Air Force, that cannot be maintained by the normal personnel assigned to the Guard Units. In order to qualify as an air technician (caretaker) under the provisions of ANGR 40-01, McCoy attended a nine month course for maintenance officers at the United States Air Force Base and Maintenance School at Chanute Air Force Base, Illinois. (R. 42). He was required to attend the school at Chanute by order of the Secretary of the Air Force. While attending this school, he was paid by the United States Air Force finance office (R. 43; Dist. Ct. Finding 7, 693).

At the time of the occurrence, in addition to carrying out his duties as Aircraft Maintenance Chief, McCoy was acting Maintenance Supervisor for the Base in the absence of Major Mitchell, who held this assignment but was away on a training program. (R. 40, 48, 71; Dist. Ct. Finding 11, R. 694).

In these positions McCoy was required to supervise the maintenance of twenty-eight aircraft, and of all other equipment allocated to the Maryland Air National Guard by the United States, in accordance with Air Force Regulations, and also to supervise the seventy-five to eighty civilian maintenance personnel who maintained the equipment (R. 37, 38, 40, 47, 68).

To insure that the unit operated the equipment in accordance with standards prescribed by the United States Air Force, an Air Force adviser on active duty with the United States Air Force was stationed at Martin Field. If he were dissatisfied with the maintenance situation, the adviser would so report to the

Air Force (R. 330; Dist. Ct. Finding, R. 694). In addition, McCoy was required to submit monthly reports respecting the equipment to the National Guard Bureau (R. 43).

United States Air Force Inspection Teams made inspections to determine whether the air technicians were complying with the requirements of ANGR 40-01. These inspections were made annually to determine whether the technicians were qualified to continue to hold their jobs (R. 307; Dist. Ct. Finding 10, R. 694).

If the United States found that a civilian employee of an Air National Guard Unit was not meeting the United States Air Force requirements, it could, in practical effect work his discharge by stopping his salary (R. 335; Dist. Ct. Finding 10, R. 694).

As an air technician, i.e., in his civilian capacity, McCoy was employed at the base during the normal work week from 8:00 A.M. to 4:30 P.M., Tuesday through Saturday, except for two Saturdays a month. On those two Saturdays, he was employed in his military status as an officer in the Air National Guard and as Squadron Maintenance Officer (R. 38; Dist. Ct. Finding 13, R. 695).

McCoy, in his full-time air technician job, was paid an annual salary in the sum of $7,500.00, by check drawn on the United States. Additionally, he was paid approximately $2,000.00 per year by the United States, for his part-time military duties (R. 41; Dist. Ct. Finding 23, R. 697).

c. Purposes of the Flight by McCoy on the Day of the Occurrence

On the morning of Tuesday, May 20, 1958, a day during which he normally worked in his civilian capacity as an air technician, McCoy reported to the base and commenced work at the usual starting time on his full-time civilian caretaker job as aircraft maintenance chief (R. 67, 68; Dist. Ct. Finding 26, R. 697), and as acting maintenance supervisor in Major Mitchell's absence (R. 77-78). Before the flight, he performed certain daily administrative duties to establish the order of business for the day. This work included the determination of which aircraft would be maintained and gotten ready for flight or repair, if necessary, and the work assignments of various individuals (R. 67, 78). At the time of the occurrence, McCoy was flying in his civilian capacity as a caretaker of government property (R. 80; Dist. Ct. Finding 34, R. 699). On the day of the occurrence, he was recorded as present at the base in his civilian capacity, was carried on the roster in his air technician pay status, and was paid by the United States Treasurer in this capacity (R. 77-78; Dist. Ct. Finding 26, R. 697-698).

McCoy's status as acting maintenance supervisor and aircraft maintenance chief made it desirable for him to make frequent aerial flights (R. 58, 59, 70-71, 81, 164, 306, 605-606). This was an important facet of his civilian work in maintenance (R. 75-77, 79, 164). As an air technician-aircraft maintenance supervisor, one reason for this flight or any flight that he made on this job was to insure the proper maintenance of the equipment over which he had general supervision (R. 69, 75-76). While flying he could better observe

from the air (a) obstructions that might be on the runway; (b) exposed lips of runways that might cause an accident; (c) foreign object damage; (d) cleanliness of his ramp (a piece of wire on the runway or ramp can be sucked into and ruin a $100,000.00 jet engine); (e) condition of the airport; (f) efficiency of the tower personnel; and (g) whether the maintenance people are in front of the intake scoop when the aircraft is parked, and whether they are waiting until the plane stops before they insert the chocks. (R. 140). McCoy as Maintenance Supervisor, in the course of each flight, by the very nature of his function and duty, would be observing the product he was required to maintain for better maintenance, safer aircraft, etc. (R. 164) In short, whenever he flew he could get a better appreciation of the way the people under his supervision were doing their job. (Dist. Ct. Finding 20, R. 696).

While the job description of the aircraft maintenance chief's position set forth in the civilian personnel manual, ANGM 40-01, contains no requirement that the holder of the position be a pilot or that he fly aircraft, the job description for the position of maintenance supervisor provides that it is "desirable" that the incumbent be a rated pilot on flying status to enable him to "make test flights on assigned aircraft" (R. 217; Dist. Ct. Finding 18, R. 696). It is desirable for the maintenance officer to have a flying status to better understand the quality of the maintenance and the condition of the equipment (Dist. Ct. Findings 16, 17, 18 and 19). General Wilson, head of the federal agency responsible for the promulgation of ANGM 40-01, and Kilkowski, McCoy's immediate superior in his civilian technician job, both testified

it was desirable for the head of the maintenance section to have a flying status, as the equipment can only be properly evaluated by flying it, and his flying the planes would give the other pilots a safer feeling because they would know that the person maintaining the plane was also flying it. Such flights by the maintenance supervisor would make for better maintenance, safer aircraft, and as a result, a better unit (R. 164). It was also part of McCoy's duties in his air technician civilian job to fly functional check flights (R. 75-77, 79, 81; Dist. Ct. Finding 20, R. 696).

McCoy also flew the airplanes to satisfy the requirements of Air Fore Regulations (AFR 60-2) and to increase his pilot rating. Since he had to maintain proficiency as a pilot in order to be qualified and competent to perform these flights, even flying for proficiency related to and was a vital part of McCoy's civilian job. (Dist. Ct. Finding 20, R. 696). During the course of the flight in question, McCoy checked the efficiency of the equipment and evaluated the quality of the maintenance (R. 162-64, 493-495; Dist. Court Finding, 21. R. 697). He watched the instruments and observed that the plane was behaving properly. He likewise had a better opportunity to observe the quality of the maintenance by flying the plane. (R. 70, 399).

The particular flight at the time of the accident was part of McCoy's function to maintain proficiency and maintain the equipment (Dist. Ct. Finding 22, R. 697). It was not a training mission (R. 80, 121, 136, 146-47, 152-53, 161-63, 586-87). The uncontradicted evidence showed that the form used for this flight was the same one used for all flights regardless of the nature of the flight, so that this form would have been used in the

case of flights made in connection with the maintenance of the plane (R. 69). While it was necessary for a person to have a military pilot's rating in order to fly a United States military plane, a person flying a plane might be performing his civilian duties as McCoy was doing on the occasion in question, and as he had frequently done on prior occasions. (R. 162-164).

McCoy could only occupy one pay status at a time, either that of a civilian caretaker in maintenance work, or that of a member of the Air National Guard in a military capacity (R. 586-87; Dist. Ct. Finding 24, R. 697). In May, 1958, at the time of the accident, McCoy had accumulated more than the number of hours for which he could earn flight pay under the provisions of AFR 60-2 for the period in question. His flight on May 20, 1958, therefore, was not to earn flight pay (R. 70, 135-36; Dist. Ct. Finding 25, R. 697).

McCoy applied to Kilkowski for permission, and received it, to make the flight on May 20, 1958. Kilkowski, like McCoy, was a civilian caretaker employed under 32 U.S.C. Sec. 709(a), and held the air technician position of base detachment commander; Kilkowski was also a member of the Maryland Air National Guard. (R. 683, Dist. Ct. Finding 14, R. 695). The flight was termed a "proficiency flight." Proficiency flights have multiple purposes, including evaluation of maintenance of the equipment, which was a responsibility of McCoy in his employment under 32 U.S.C. Sec. 709(a), Dist. Ct. Finding 20, R. 696).

McCoy was accompanied on the flight in qeustion by a passenger, Donald Chalmers. Chalmers was required to sign a release prior to the flight, releasing the United States and the State of Maryland from any

liability in the event of Chalmers injury or death, during the flight because of "negligence, faulty pilotage, or structural failure of the aircraft." (Dist. Ct. Findings 15, 28, R. 695-698).

d. Circumstances Subsequent to the Accident Establishing the Employment Relationship

Subsequent to the occurrence, McCoy received benefits under the provisions of the Federal Employees' Compensation Act, 5 U.S.C. § 751, which provides for payment of compensation by the United States to an employee of the United States injured "while in the performance of his duty." The papers pertaining to McCoy's compensation claim were processed by Col. Ebaugh, United States Property and Fiscal Officer for the State of Maryland, a Federal employee. The forms needed for the claim were provided by the Department of Labor and used in all instances for Caretakers-Technicians (R. 240-241). Col. Ebaugh in the course of his employment by the United States and pursuant to his duty to correctly certify the capacity in which McCoy was working, certified as follows:

> "I certify that Julius R. McCoy was working as a Civil Employee of the United States at the time of injury and *not* as a member of the Maryland National Guard." (R. 228).

This certificate was required by the United States Department of Labor and Col. Ebaugh's investigation led him to believe that he was justified in filling out this certification (R. 245).

The Bureau of Employees Compensation, Department of Labor, handled this case in the same manner as cases involving other employees of the United States Government. Its employees processed the claim of

McCoy and adjudicated that he was in the performance of his duty as an employee of the United States at the time of the accident.

Subsequently, at the request of the United States, and pursuant to Statute, McCoy executed an assignment to the United States under the provisions of the Federal Employees' Compensation Act, of his rights of action against Capital Airlines and others and said assignment, prepared by the United States, stated that he was employed by the Department of the Air Force as an Aircraft Maintenance Chief (Pilot) at the time of the occurrence (R. 225-227). The United States at no time offered testimony to show that a mistake or error was made by either Col. Ebaugh or the Department of Labor.

e. The Air National Guard

The overall purpose of the National Guard is to provide a pool of combat ready reserve forces to be used in case of a national emergency involving the defense of the United States; 32 U.S.C. Section 102.

The Air National Guard operates at large without regard to state boundaries. According to Standing Operating Procedure No. 3, promulgated January 2, 1957 (Defendant's Ex. 3) (R. 663-664), the local flying area for the 104th Fighter Interceptor Squadron over which flights were made daily by the squadron McCoy was a member of, included the States of Maryland, Pennsylvania, New Jersey, Delaware and Virginia. The squadron's overall training area was considered to be in the continental United States (R. 690).

The Air National Guard had some twenty-four wings of which seventy-three squadrons were equipped

with jet fighters. All of these units had a D-Day mission with a major command in the Air Force (R. 321).

The 104th Fighter Interceptor Squadron was part of the air division at Andrews Air Force Base. As such, it had been given a D-Day mission with the Air Defense Command in the role of fighter interceptor squadron for which it was trained and equipped. In case of emergency or requirement by the Air Force, the 104th was required to be able to get at least fifty percent of its aircraft fully armed in the air in the first hour (R. 333).

SUMMARY OF ARGUMENT

A. These cases were appealed to the Third Circuit on the questions (1) whether McCoy at the time of the airplane accident was an employee of the United States, and (2) was the right of the United States to control him at the time of the occurrence such that the United States, if a private person, under the respondeat superior law of Maryland would be liable for his negligence under the Federal Tort Claims Act. These issues had been previously resolved in the United States District Court for the District of Columbia on the same record in suits brought by the estates of the pilot and copilot of the Capital plane, and by Capital for its destruction.

While the appeal was pending in the Third Circuit, the United States Court of Appeals for the District of Columbia Circuit affirmed the decision of its District Court which had in the meantime been followed by the United States District Court in Pittsburgh. The action of the District of Columbia Circuit, as well as the denial of certiorari by this Court, were brought

to the attention of the Third Circuit before it rendered its split decision.

Since the cases here were brought on behalf of the estates of two passengers riding on the Capital plane and since the identical issues of fact and law had been previously heard and disposed of on their merits in the District of Columbia, the Third Circuit was required to folow the decision of the District of Columbia Circuit under the doctrines of res judicata and collateral estoppel, and to give full faith and credit to the previous decision.

The trial courts in the District of Columbia and in Pittsburgh, and the Court of Appeals for the District of Columbia Circuit, correctly determined and applied the respondeat superior law of Maryland to the factual situation in these cases, and held that the United States, if a private party, would have been liable under the law of Maryland for the negligence of McCoy at the time of the occurrence. The Third Circuit erred in disregarding the findings of the trial court, in making its own findings not warranted by the evidence, and by citing and relying on Maryland cases which factually and legally were not pertinent.

B. Julius R. McCoy was an employee of the United States acting within the scope of his employment within the purview of the Federal Tort Claims Act at the time of the occurrence. Every Court of Appeals which has considered the question (except the Third Circuit) has held by reason of the extent of control the United States has over civilian caretakers, that they are employees of the United States.

The question of scope of employment is resolved by a consideration of the evidence under the applicable

law of Maryland, the place where the negligence occurred; *Williams* v. *United States*, 350 U.S. 857 (1955). The abundant evidence on this point is aided by the strong presumption under the law of Maryland, that the United States owned and maintained plane was being operated by its employee acting within the scope of his employment at the time of the accident.

Additionally, there were significant admissions made by the United States (1) through an acknowledged employee, Colonel Ebaugh, on active duty for the United States as United States Property & Fiscal Officer for the State of Maryland, and (2) by the Bureau of Employees Compensation Commission that McCoy was acting as an employee of the United States when injured.

C. Finally, if it can be concluded despite the evidence and presumptions to the contrary that McCoy was in the plane solely in his military capacity and doing military work only as a member of the Air National Guard of Maryland, then because of the dual relationship and control in both the Federal and State governments over such units and their members, he should be regarded as an employee of the United States whether the unit had been ordered to so-called "active" duty, or not.

ARGUMENT

I. THE FINAL JUDGMENT IN UNITED STATES v. STATE OF MARYLAND FOR THE USE OF MARY JANE MEYER, ET AL., CASE NO. 543 IS A BAR TO THE DEFENDANT'S RELITIGATING THE IDENTICAL FACT AND LEGAL QUESTIONS.

Where a litigant has had his day in court, and has received a full and fair hearing on the merits, and a final judgment has been rendered against him on issues heard and determined in that case, the requirements of due process have been satisfied and that litigant should not be permitted to try again in another case or cases arising out of the same occurrence the identical issues of fact and to re-argue identical questions of law.

The three actions instituted in the District of Columbia were brought by the estates of the pilot and co-pilot of the Capital Airlines plane, and on behalf of Capital for the value of the plane destroyed in the fatal accident. The two cases brought in the State of Pennsylvania were by the estates of two passengers in the Capital plane killed in the same accident. The identical issues of employment and scope of employment of McCoy, the pilot of the United States owned plane, were adjudicated, first in the District of Columbia and then again in Pittsburgh. The Federal Court for the Western District of Pennsylvania followed the decision of the District of Columbia District Court on these issues but the Third Circuit declined to follow the decision of the District of Columbia Circuit which had subsequently affirmed the District Court on the critical issues. In both the District of Columbia Circuit and in the Third Circuit, the United States urged precisely the same points to wit: that McCoy was not an employee of the United States at the time of the accident, nor was he within the scope of em-

ployment of the Federal Government within the purview of the Federal Tort Claims Act. The District of Columbia District Court heard the oral testimony of the key witnesses on these issues, considered the depositions which were a part of the record, and found against the United States. Thereafter, in Pittsburgh, the Government offered no additional evidence and the Pennsylvania Court, after considering the same record, followed the District of Columbia Court.

It is thus a fact that the issues decided in the prior adjudication in the District of Columbia were identical, that a final judgment was rendered on the merits and that the United States of America was the defendant in both law suits. The Third Circuit therefore was required to follow the decision of the District of Columbia Circuit under the doctrines of both res judicata and collateral estoppel.

Chief Justice Warren in *Lawlor* v. *National Screen Service, Corp.*, 349 U.S. 322 (1954), pointed out the basic distinction between the doctrines of res judicata and collateral estoppel and said as follows:

> "* * * The basic distinction between the doctrines of res judicata and collateral estoppel, as those terms are used in this case, has frequently been emphasized. Thus under the doctrine of res judicata, a judgment 'on the merits' in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, such a judgment precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit * * *"

Many courts have abandoned the requirement of mutuality and have confined the requirement of privity

to the party against whom the plea of res judicata is asserted. *Bernhard* v. *Bank of America Nat. Trust & Sav. Ass'n.*, 122 P. 2d 892, 19 Cal. 2d 807 (1942). The requirement of mutuality must yield to public policy for to hold otherwise would be to allow repeated litigation of identical questions, expressly adjudicated, and to allow a litigant having lost on a question of fact to re-open and re-try all the old issues each time he can obtain a new adversary not in privity with his former one. *Coca-Cola* v. *Pepsi-Cola Co.*, 172 A. 260, 36 Del. 124 (1934). All that due process requires is that the party who is now being bound was a party to the earlier judgment. It does not give the party the right to litigate the same question twice. *Chicago Life Ins. Co.* v. *Cherry*, 244 U.S. 25 (1916). And see *Davis* v. *McKinnon & Mooney*, 266 F. 2d 870 (6th Cir., 1959).

This court has had occasion many times to examine the nature of the doctrine of res judicata. In *Partmar Corp.* v. *Paramount Theatres Corp.*, 347 U.S. 89, (1953), Justice Reed stated:

> "We have often held that under the doctrine of res judicata a judgment entered in an action conclusively settles that action as to all matters that were or might have been litigated or adjudged therein. But a prior judgment between the parties has been held to operate as an estoppel in a suit on a cause of action different from that forming the basis for the original suit 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered'. This latter aspect of res adjudicata is the doctrine of collateral estoppel by judgment established as a procedure for carrying out the public policy of avoiding repetitious litigation."

Cromwell v. *County of Sac., State of Iowa*, 96 U.S. 51 (1877); *Southern Pacific Railroad* v. *United States*, 168 U.S. 1, 49 (1897).

United States v. *United Air Lines, Inc.*, 216 F. Supp. 709, 725-729 (1962), affirmed and approved in *United Air Lines, Inc.* v. *Wiener*, 335 F. 2d 379 (1964), in discussing the rationale of the holding that United Air Lines was collaterally estopped, pointed out (p. 729) that the case had already been "litigated to the hilt * * *" and that United Air Lines "not only failed to indicate that it has any new, different or additional evidence, but it has also affirmatively indicated that it has none." This precisely describes what occurred in the Meyer case where the Government asked for and by agreement of counsel received a separate full trial on the issue of agency before any further question was considered in the case. And the evidence in the Levin and Johns cases was identical with the evidence in the Meyer case because the trial in Johns and Levin was based entirely on the record in the Meyer case.

As the Court said in the *United* case, p. 728:

> "It would be a travesty upon that concept ('in the interest of justice') to now require these plaintiffs who are the survivors of passengers for hire on the United Air Lines plane to again re-litigate the issue of liability after it has been so thoroughly and consummately litigated in the trial court in the 24 consolidated cases tried at Los Angeles. * * * The defendant has had its day in court on the issue of liability before a jury."

The constitutional and statutory provisions requiring full faith and credit articulate and implement the dictate of public policy "that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." *Baldwin* v. *Iowa State Traveling Men's Association*, 283 U.S. 522 (1930).

Confronted with the problems of res judicata and collateral estoppel the respondent United States of America in its reply memorandum to the petition for certiorari (Footnote, p. 4) stated:

> "It is not clear whether the two courts placed their decisions on precisely the same facts".

Nothing, it is submitted, could be clearer from the records in the two cases.

It is respectfully suggested that there is every good reason for applying the doctrine of collateral estoppel in these cases and holding that the decision on the questions of agency and scope of employment heard, litigated and decided in the cases in the District of Columbia, is res judicata on those issues with respect to which the defendant had the opportunity to be heard and was in fact heard in the Meyer cases. To hold otherwise, to allow the Government to go on litigating these same questions, in other circuits using the identical evidence and the same arguments as to the law, after there has been an adjudication on these questions adverse to the Government's contentions, is in derogation of the binding effect and authority that should attach to final judgments rendered by a court after a full hearing and a decision on the merits on questions of fact and law.

II. PERSONS EMPLOYED AS "CARETAKERS" OF FEDERAL PROPERTY UNDER THE PROVISIONS OF 32 U.S.C. § 709 (a) ARE EMPLOYEES OF THE UNITED STATES WITHIN THE PURVIEW OF THE FEDERAL TORT CLAIMS ACT.

Every court of appeals which has considered the question, other than the 3rd Circuit in the present case, has held that a caretaker of federal property employed under the provisions of 32 U.S.C. § 709 (a) is an employee of the United States within the purview

of the Federal Tort Claims Act; *United States* v. *Holly*, 192 F. 2d 221 (10th Cir. 1951); *Elmo* v. *United States*, 197 F. 2d 230 (5th Cir. 1952); *United States* v. *Duncan*, 197 F. 2d 233 (5th Cir. 1952); *Courtney* v. *United States*, 230 F. 2d 112 (2nd Cir. 1956); *United States* v. *Wendt*, 242 F. 2d 854 (9th Cir. 1957); *Pattno* v. *United States*, 311 F. 2d 604 (10th Cir. 1962), cert. denied, 373 U.S. 911 (1963).

In each of the above cases, the court held that a federal statute creates the position of unit caretaker and outlines his duties generally; that the pay for his services is wholly from federal funds; that federal regulations define the duties and responsibilities of the caretaker in detail; that the Secretary of the Army (Air Force) fixes the maximum pay scales, and then delegates to the adjutant general of the state the task of setting actual rates of pay, within limits fixed by federal regulations; that the primary duties of caretakers are the care and maintenance of federal property allocated by the United States to the National Guard for military purposes; that the Secretary of the Army (Air Force) through the Chief of the National Guard Bureau and through the state adjutant general to whom certain powers have been delegated, has the full right to control the employment, work and discharge of the caretaker; and that the federal government has the right to direct and control the method and means by which a caretaker performs his service.

The Secretary of the Air Force could not delegate an authority which he did not in fact have, and the authority to employ, fix rates of pay, establish duties and work hours and to discharge an employee covers every essential test of the employer-employee relationship. Any authority the adjutants general exer-

cised in this area was only authority delegated to them by the person who had it, and even then it was used subject to federal control and instructions issued from time to time from the National Guard Bureau in the Pentagon.

The National Guard Regulations No. 75-16, dated December 29, 1947, expressly state that the National Guard civilian personnel referred to are employees authorized under § 90 of the National Defense Act for administrative and accounting duties, maintenance repair and inspection of materiel, armament, vehicles and equipment provided for the National Guard by the Federal Government. The Air Force then promulgated the Air National Guard Manual governing civilian personnel, which provided for the jobs McCoy held at the time of the occurrence, as base maintenance supervisor and as aircraft maintenance chief. McCoy was the only officer maintenance supervisor of aircraft maintenance at the Base at the time of the occurrence available to perform the necessary task of flying the aircraft to evaluate the equipment maintenance and he had general supervision over the maintenance of all federal equipment including airplanes allocated to his unit. He flew the airplanes to evaluate the quality of the maintenance work performed on them, and also flew functional check flights while working in his civilian maintenance status.

The brief of the petitioner sets forth in the Appendix numerous federal regulations illustrating the scope and nature of federal supervision and control over its civilian caretakers.

These factors have satisfied all courts of appeals (other than the 3rd Circuit in the instant case) that the status of a caretaker as a civilian employee of the

United States is clearly distinguishable from that of a military member of a non-activated National Guard Unit. And the 3rd Circuit, in *O'Toole* v. *United States,* 206 F. 2d 912 (1953) had unequivocally approved the rationale in the *Holly* and *Duncan* cases, supra (p. 916).

It has been shown that the term "employees of the Government," as used in the Federal Tort Claims Act, 28 U.S.C. § 2671, is very broad, and as has been indicated, the Act is to be liberally construed.

When the Department of Justice presumably was expressing its nonpartisan views on this question, Deputy Attorney General Walsh, on May 23, 1960, advised the Senate Committee on the Judiciary that proposed legislation which would have amended the Federal Tort Claims Act to expressly include caretakers as employees of the United States was unnecessary because "an unbroken series of court decisions" had held the Federal government was responsible for the torts of caretakers "because of the control relationship between such persons and the Federal Government." (Opinion of District of Columbia Court of Appeals, Petition of United States for Writ of Certiorari in *Meyer,* No. 543, Appendix A, 8a, 9a, n; Hearings on S. 1764 before the Senate Committee on Judiciary 86th Congress, 2d Sessions (1960)).

III. PRIOR TO THE DECISION OF THE THIRD CIRCUIT IN THE LEVIN AND JOHNS CASES, THE LOWER COURTS HAD CORRECTLY INTERPRETED AND APPLIED THE RESPONDEAT SUPERIOR LAW OF MARYLAND IN THESE CASES.

Assuming that all courts which so held were correct in concluding that a "caretaker" employed under 32 U.S.C. § 709 (a) is an employee of the United States, then the question whether the employee was acting within the scope of his employment, at the time of

the occurrence, so that the Federal Government, if a private person, would be liable to the claimant is answered by a consideration of the evidence under the applicable law of Maryland, the place where the negligence occurred; *Williams* v. *United States,* 350 U.S. 857 (1955).

McCoy was performing his civilian work when flying the airplane during his civilian work week as a part of his job as a maintenance supervisor. The District of Columbia Court, in its findings, indicated that it concluded and found that McCoy was performing part of his work and duties as civilian maintenance supervisor while flying the airplane (R. 687). Fair evaluation of all the testimony on the subject by Gen. Wilson, Col. Kilkowski and McCoy, and of the applicable Order, Regulations and Manuals of the U.S. Air Force, lead inescapably to the conclusion that flying the airplane to determine the quality of maintenance work done on it was an indispensable part of the work of maintenance of airplanes, and that Captain McCoy, with a flying status, and as the only qualified officer in a supervisory maintenance position on the base at the time, was the proper person to do that work.

All aircraft maintenance is designed to prevent a malfunction from occurring rather than merely to correct or repair a malfunction after it has occurred. It is this preventive maintenance program with respect to aircraft that is so important. Evaluation of maintenance work was more than an incident of McCoy's employment, it was one of the most significant aspects of it.

The need for such preventive maintenance is immediately apparent when we consider the nature of the

operation of the aircraft and the fact that a malfunction while flying along at an altitude of 20,000 feet cannot be corrected or repaired in the same manner as repairing a defect in an automobile which occurs while it is traveling on a highway or repairing a defect in a rifle or tank or gun which occurs while it is in use. Even a small defect in a part or a minor oversight in maintenance can cause aircraft to crash to the ground with catastrophic results in death and destruction to persons and property on the ground, as well as all those in the aircraft. The most careful and painstaking program of check and inspection of the aircraft and all its components is, therefore, necessary in order to detect an abnormal condition before it results in a tragic accident. No matter how carefully done, ground inspection of the highly complicated machinery of jet aircraft does not always give the complete picture. It is only by operating the machinery, which in the case of a jet aircraft, means flying it, that the quality of its maintenance can be truly determined. McCoy, as Maintenance Supervisor, was charged with the responsibility in his civilian caretaker capacity of maintaining all the aircraft and equipment at the base. In order to qualify him for his highly technical duty, he had undergone an intensive nine-month course in aircraft maintenance. He was the only officer maintenance supervisor on the base with highly trained knowledge in this special field, and with capability of performing this duty. He was not a mechanic whose only function was to perform repairs. His prime function was to supervise the entire base maintenance program on aircraft and in order to carry out this function, he necessarily had to operate and fly the planes to check the quality of the maintenance of the aircraft under his supervision.

A fair analysis of the evidence discloses that McCoy was flying either solely in his civilian air technician status or in a dual capacity as a military pilot (because he needed the pilot's license to fly the plane) and as a civilian air technician at the time of the accident (R. 79, 80, 118, 587, 588). And he was then doing the work of an air technician in a supervisory position (R. 70, 79, 80, 121, 137, 138, 139, 140). McCoy was not in a flying training period at the time of the accident. (R. 80, 121, 136, 146, 147, 152-153, 161-163, 167, 586-587). He was flying a United States owned airplane, 32 U.S.C., Sec. 710(a).

The test as to whether the relationship of master and servant exists under the law of Maryland is the "right to control," *Keitz* v. *National Paving & Contracting Co.*, 214 Md. 479, 491, 134 A. 2d 296, 301 (1957).

Under Maryland law, there is a presumption that the operator of a vehicle is the agent, servant, or employee of the owner thereof. The presumption is rebuttable. *Keitz, supra; Fowser Fast Freight* v. *Simmont,* 196 Md. 584, 588, 78 A. 2d 178 (1946); *Pennsylvania R.R.* v. *Lord*, 159 Md. 518, 151 A. 400 (1930).

Under the law of Maryland, it is also presumed that the agent, servant or employee was operating the vehicle within the scope of his employment. This presumption may also be rebutted, but only by satisfactory evidence to the contrary. *Brown* v. *Bendix Aviation Corporation,* 187 Md. 612, 621, 622; 51 A. 2d 292 (1947); *Erdman* v. *Horkheimer,* 169 Md. 204, 206, 207; 181 A. 221 (1935).

Article 1-A, Sec. 10, p. 197, Anno. Code of Maryland provides that the liability of an aircraft owner for

mid-air collision is to be determined by the law applicable to torts on land. Under this statute, the presumption of agency through ownership would apply to aircraft.

Here the jet aircraft involved was owned by the United States, was in the possession of McCoy, and was being piloted by him. Under the law of Maryland, the state where the airplanes collided and crashed, a presumption arises from those facts that McCoy was acting as an employee of the United States within the scope of his employment at the time of the occurrence.

Analgous to the contention of amici curiae on this point is the holding in *United States* v. *Baker,* 265 F. 2d 123 (1959); *Baker* v. *United States,* 97 U.S. App. D.C. 281, 230 F. 2d 831. The Court there said that the law of Virginia gave rise to the presumption that the serviceman driver was acting within the scope of his employment. The United States claimed this presumption had been rebutted by uncontradicted evidence, had therefore "dropped out of the case," and that once the presumption was removed, the testimony in the case was decisive on the issue of scope of employment. This court declined to so hold, stating that in reviewing the trial court's findings and conclusions, it would not be warranted to hold that the evidence relied upon by the government was uncontradicted and overcame the presumption that the serviceman driver was acting within the scope of his employment.

Although the presumptions of agency and scope of employment may be rebutted, the burden of overcoming it rests upon the defendant. Great weight attaches to these presumptions under Maryland law and the

evidence necessary to destroy the presumption "must be uncontradicted and conclusive." *Scott* v. *James Gibbons Co.*, 192 Md. 319, 64 A. 2d 117, 119 (1949).

In *Grier* v. *Rosenberg*, 213 Md. 248, 131 A. 2d 737 (1957), the Court said as follows:

> "In cases of this nature, after the plaintiff has offered proof of the ownership of the automobile in the defendant, if the defendant does not offer any evidence on the issue of agency, the Court should instruct the jury that if they find as a fact that the defendant owned the car, they must find that he is responsible for the negligence (if any) of the driver. If the defendant does present evidence to show that the alleged driver was engaged on business or a purpose of his own, it may be so slight that the Court will rule it is insufficient to be considered by the jury in rebuttal of the presumption, in which case the Court should grant the same instruction it would have granted if the defendant had offered no evidence on the issue. The evidence may be so conclusive that it shifts the burden or duty of going forward with the evidence back to the plaintiff, in which event the defendant would be entitled to a directed verdict, if the plaintiff does not produce evidence in reply, unless there is already evidence in the case tending to contradict defendant's evidence. *Erdman* v. *Horkheimer & Co., supra,* 169 Md. 207; 181 A. 221; *Fowser Fast Freight* v. *Simmont, supra,* 196 Md. 588; 78 A. 2d 178. The evidence, however, may fall between the two categories mentioned above, in which event the issue of agency should be submitted to the jury. Cf. 3 *Md. Law Rev.* 287, 288. It would be difficult, if not impossible, to lay down a rule, that would apply in all cases, as to when the evidence is so slight that it is insufficient to be considered by the jury in rebuttal of the presumption of agency, or so conclusive as to require a directed verdict for the defendant. These matters must

depend upon, and be decided by, the facts developed in each individual case."

The Government failed utterly to meet its burden of presenting evidence rebutting these presumptions. Instead, the evidence overwhelmingly supports the petitioners' position that at the time of the occurrence McCoy was acting as a civilian employee of the United States in the scope and course of his employment.

In the Meyer cases, the Court of Appeals examined the law of Maryland concerning the liability of a private person for the negligence of his agent and held that the decisive test for determining a master-servant relationship is the "right of control." The soundness of this interpretation of Maryland law can be seen from *Keitz, supra,* where the court said at page 491:

> ". . . it is not the manner in which the alleged master actually exercised his authority to control and direct the action of this servant which controls, but it is his *right* to do so that is important. *Sun Cab Co. v. Powell,* 196 Md. 572, 578 (1951); 77 A. 2d 783 . . ." (Emphasis in the original.)

The *Keitz* case enumerated the various elements which may be present in varying degrees where there is an employer-employee relationship, not all of these elements necessarily being present in each case. The court there said that those elements, some or all of which may be present where the employer-employee relationship exists, are: (1) the selection of the servant, (2) the payment of wages, (3) the power to discharge, (4) the power to control the servant, and (5) whether the work is part of the regular business of the employer. The element of paramount importance as stated by the court, is the fourth one mentioned,

the power to control the servant. To the same effect, see *Sun Cab Company* v. *Powell,* 196 Md. 572, 578, 77 A. 2d 783 (1951); *Charles Freeland and Sons, Inc.* v. *Couplin,* 211 Md. 160, 169, 170, 126 A. 2d 606 (1956).

Although all the elements enumerated in *Keitz, supra,* need not be present to create a fact question as to an agency relationship, it will be observed that all the elements mentioned in that case are present in the relationship between the federal government and caretakers employed to care for and maintain federal equipment. Federal law (32 U.S.C. § 709) specifically authorizes employment of the caretaker to maintain federal property and the statute provides he must be a "competent" person. The Department of the Air Force, by ANGR 40-01, § 3b expressly delegates the authority of federal officials (1) to employ caretakers, (2) to fix the rates of pay of caretakers, (3) to establish work hours, (4) to supervise caretakers, and (5) to discharge caretakers, all subject to law and to instructions which may be issued by the National Guard Bureau.

The Government admitted in its petition for the writ of certiorari in the Meyer cases that "the result reached by the Court of Appeals did not stem from any misapprehension as to State law" (Petn. 22).

Whether the United States had the "right to control" the action of McCoy at the time of the occurrence depends on the employment relationship that existed between McCoy and the United States at that time. To determine the nature of the employment relationship, it is necessary to examine ANGR 40-01 § 3(b), wherein the Department of the Air Force expressly delegates the authority of federal officials to supervise caretakers in the performance of their work, sub-

ject however to instructions that may be issued by the National Guard Bureau (R. 658).

The Federal government did not stop with its right to control McCoy in the performance of his civilian work. It actually exercised control over him.

National Guard Regulation No. 75-16 (NGR 75-16), entitled "Accounting Clerks and Caretakers" issued by order of the Secretary of the Army, through the National Guard Bureau on December 29, 1947 (Pltf's Ex. 15, R. 634-645), and ANGR 50-01, issued November 27, 1950 (Def's. Ex. 9, R. 671-677) disclose the detailed control which the United States exercised over caretakers employed under the authority of 32 U.S.C. Sec. 709, and the use of the Adjutants General of the State made by the Department of the Air Force, and by the Chief, National Guard Bureau to carry out Federal orders, directives, and procedures governing caretakers (Brief for the Respondent, No. 543, App. pp. 1a-3a, 21a). Any authority exercised over McCoy as a civilian maintenance supervisor stems from a direct delegation of authority by the Secretary of the Air Force. Col. Kilkowski, McCoy's immediate superior, was the Base Detachment Commander to whom the Adjutant General delegated the actual work of daily supervision of McCoy in his capacity as an air technician-caretaker, working in a supervisory maintenance position. McCoy's work was confined exclusively to Federally-owned equipment. And any authority or control exercised over him was in conformity with Federal directions and regulations issued by the Air Force and the National Guard Bureau. (Defendant's Exhibit 7, A.F.R. 45-2, 20a).

As was pointed out by the Court of Appeals in the Meyer cases, the functions lodged by the United States

in the State Adjutant General did not serve to supplant this right of control in the United States, though it may be said to have been ancillary thereto (Petn. for the Writ of Certiorari, Meyer cases, Appendix A, 7a).

Neither Judge Smith, nor Judge Hastie in his partially concurring opinion, mentioned or gave any consideration to these presumptions of agency and scope of employment which arise under the law of Maryland. Judge Hastie could not do so because he concluded, and amici curiae believe erroneously under the facts of the case, that it was not necessary to decide the first question, i.e., whether McCoy was an employee of the United States. If he had decided the first question, he could have given due weight to the presumption of agency, and then, in deciding the next question, scope of employment, he could have considered the presumption under local law that an employee is acting in the scope of his employment.

The Maryland cases with respect to agency and scope of employment relied on by the Court of Appeals, Third Circuit, are inapposite. They involve different factual situations. The master-servant relationship depends upon and must be decided by the facts developed in each individual case. None of the cases cited by the Third Circuit involve the operation of a motor vehicle owned by the defendant to be charged. Some of them did not involve motor vehicles at all. In none of them did the plaintiff have the presumptions to which the plaintiffs are entitled in this case under Maryland law. For instance, in *Henkelmann* v. *Metropolitan Life Insurance Co.*, 180 Md. 591, 26 A. 2d 418, cited by the Court, the defendant did not own the vehicle involved in the accident. The operator of the vehicle was employed by Metropoli-

tan as an insurance agent or salesman. He was free to select his own mode of transportation. The vehicle involved belonged to the wife of the operator. The operator was using the vehicle for his own personal convenience but was under no duty to use it and Metropolitan bore no part of the expense of operation or maintenance. The Court of Appeals of Maryland held that the operator was an independent contractor. The essential elements of choice and the lack of ownership of the vehicle present in Henkelmann are not present here. The other cases cited by the Third Circuit likewise are not pertinent. *Lewis* v. *Accelerated Transport-Pony Express, Inc.*, 148 A. 2d 783 (1959) involved an action for slander. *Globe Indemnity Company* v. *Victill Corp.*, 119 A. 2d 423, 427 (1956) involved an action for assault. *Eyerly* v. *Baker*, 178 A. 691, 696 (1935) involved a customer in a store who was injured by a revolving door put in motion by a salesperson who was returning to work. The salesperson's employment imposed no duty on her with respect to the operation or control of the door which caused the injury. In *Greer Lines Co.* v. *Roberts*, 139 A. 2d 235, 239 (1958), Greer left his motor vehicle with a repairman to be repaired. The negligence of the repairman caused the plaintiff's injuries. In *Gallagher's Estate* v. *Battle*, 122 A. 2d 93, 98 (1956), defendant, Gallagher, was not the owner of the vehicle involved in the accident. The vehicle had been leased from another and the lease—a one-trip lease—had expired at the time of the accident. In *Victill*, supra, at page 583, the Court of Appeals of Maryland quoted with approval from *Mechem* Outlines of Agency, 4th Edison, Sec. 446, where it was said "Were the saleman driving his employer's car, the inference of control would be strong and he would likely be held a servant". Thus, it will be seen

that the Maryland Court realizes that where the vehicle is owned by an employer, a different conclusion is not only warranted but required if there is no evidence to rebut the presumption arising from such ownership.

A majority of the court in the Third Circuit did not pass on the question whether civilian caretakers of federal property allocated to National Guard units are employees of the United States. Judge Smith, who wrote the opinion for the Court, held persons so employed were not employees of the United States. Judge Hastie (329 F. 2d 732) stated that he was not expressing any opinion on that subject. Judge Staley, dissenting, expressly held that civilian caretakers employed under 32 U.S.C. 709(a) to care for the material, armament and equipment of the Federal Government allocated to the National Guard units are employees of the United States. Judge Smith therefore was the only member of the Court who decided to overturn the findings of fact by Judge Gourley on this point.

Judge Gourley, by agreement of the parties, had tried the *Levin* and *Johns* cases on the record made in the trial of the *Meyer* cases in the United States District Court for the District of Columbia. Judge Matthews of that Court did see and hear "live" witnesses on the agency issue. Judge Smith held that Rule 52(a) of the Federal Rules of Civil Procedure was not applicable under the circumstances and that the findings of the trial judge "need not be given the weight usually accorded them under the rule," and that the Court of Appeals was "in as good a position as was the trial court to evaluate the evidence, draw the inferences of which the evidence is reasonably susceptible, and decide the critical questions raised on this appeal."

It is believed this was a misinterpretation of Rule 52(a). In disregarding Judge Gourley's findings of fact, Judge Smith was, in effect, as the present posture of the *Meyer* cases demonstrates, also attacking or jeopardizing the findings of fact made by Judge Matthews who did see and hear the witnesses. The view that several courts have taken that Rule 52(a) has limited application where the case is tried on stipulated facts and documentary material, and where there is no conflict in the evidence or the inferences which can reasonably be drawn therefrom, *United States* v. *Mississippi Valley Barge Line Co.*, 285 F. 2d 381, 388 (8th Cir., 1960), should not be extended to a situation such as was presented here. Otherwise one court of appeals (the District of Columbia Circuit) is governed by Rule 52(a) and gives due weight to the findings of fact, while another circuit (the Third) is not governed by Rule 52(a) and gives little or no weight to substantially the same findings of fact by a trial court made at a subsequent time based on the identical evidence received in the prior trial.

If Rule 52(a) has little or no effect when a case is tried on a record of proceedings from a prior trial, no litigant will be willing to go through such a trial. If he prevails in the trial court, he will know that it will carry minimal weight with the reviewing court. There will be no point in stipulating to trying the case on the prior record on the theory it will save time and expense for all concerned. The trial judge will be reluctant to undertake a trial where his patient and thorough examination of the evidence, and making of findings of fact, may constitute an exercise in futility because the reviewing court can treat his findings for naught.

A. Admissions Made by the United States Subsequent to the Occurrence Supporting the Conclusion That McCoy Was An Employee of the United States and Acting in the Scope of His Employment

Following the accident there were admissions and affirmative acts of authorized employees of the United States confirming the fact that McCoy was acting in his capacity as an employee of the Federal Government at the time of the accident.

The certificate prepared by Col. Ebaugh is an admission against interest on the part of the United States. *Chicago* v. *Greer,* 9 Wall 726, 19 L.ed. 769 (1870), 20 Am. Jur., *Evidence* Sec. 603, p. 516 (perm. ed. 1939). Col. Ebaugh, in certifying McCoy was an employee of the United States at the time of the occurrence, was acting in an authorized capacity in the discharge of his official duties (R. 276); therefore, his certificate is an admission by the United States.

The fact that the United States took an assignment from McCoy is also further evidence that he was an employee of the Government at the time of the occurrence. *Pittsburg Construction Co.* v. *Gannon,* 46 U.S. App. D.C. 131 (1917).

It is clear from the foregoing authorities that the certification of Col. Ebaugh as to McCoy's status at the time of the occurrence, the subsequent payment of compensation benefits to McCoy, and the assignment taken by the United States from McCoy, all must be taken as evidence tending to show that McCoy was an employee of the United States at the time of the occurrence. Evidence of each of these acts of the Government was admissible both as an admission and as a record made in the normal course of business.

IV. THE UNITED STATES IS LIABLE FOR THE NEGLIGENCE OF McCOY EVEN IF HE WERE WORKING NOT AS A CARETAKER AND IF HE WERE PERFORMING SOLELY MILITARY WORK AS A "MEMBER" OF THE MARYLAND AIR NATIONAL GUARD

It is believed the Court need not reach the question whether the United States would be liable for the negligence of McCoy if he were acting solely in a military capacity doing only military work as a "member" of the Maryland Air National Guard. The evidence demonstrates that McCoy was engaged in whole or in part in the performance of his civilian work at the time of the occurrence. The Government conceded in the Meyer cases that McCoy was acting at least in part in his civilian capacity at the time of the occurrence (Appellants' Brief, Court of Appeals for the District of Columbia Circuit, Cases 16953; 16954; 16955, p. 16) and even if the conclusion were reached that McCoy in some limited sense was performing military duties as well as carrying out the duties of his civilian job at the time of the occurrence, the Government would not be relieved from liability in this case. And while amici curiae submits there is no substantial basis under the evidence for the holding of the 3rd Circuit that McCoy was acting as a "member" of the National Guard, and working solely in a military capacity at the time of the occurrence, nevertheless, even if the evidence had so shown, the Government should be held responsible for his acts because of the dual role and relationship McCoy occupied with respect to both the federal and state governments while performing solely military duties as a member of the National Guard, and because of the right and power of the federal government to control his flying activities, including the use of its plane, its fuel, in the flying area it specified, under Air Force Regulations with which McCoy was compelled to comply.

In *Layne* v. *United States,* 295 F. 2d 433 (7th Cir. 1961), cert, den. 368 U.S. 990, it was held that a "member" of the National Guard, not a caretaker, killed while solely on a military training mission as part of a unit which has not been activated, was an employee of the United States. Recovery of damages for the death of Major Layne, the guardsman, in a suit based upon the FTCA was denied on the authority of *Feres* v. *United States,* 340 U.S. 135 (1950), where it was held that a serviceman cannot recover damages for injuries, incident to the service. The trial court in the *Layne* case, 190 F. Supp. 532 (So. Dist. Ind. 1961) held that Major Layne had a dual legal relationship to the United States and to the State of Indiana when killed, and that he was in the service of the United States as well as the State of Indiana, when on the training flight; that it could not be said that he was not in the service of the United States because of the term "inactive" service. The court further stated, p. 536:

> "It is possible, depending on the facts, for a guardsman to be performing several duties for both the state and the National Governments, the joint performance of which may be the proximate cause of an incident injuring another in which event both State and Nation would be liable, if immunity had been waived. . . ."

The court emphasized the fact that Layne was operating a jet plane of the United States, had a direct duty to the United States of America to safeguard the plane, and was performing service for the United States in a military status while executing commands of the State of Indiana. The court pointed out, as the claimants in this case have contended throughout that, p. 538:

> "It is unreasonable to suggest that the training of a jet aircraft pilot, . . . or the use of the jet aircraft in question, would be useful to the accomplishment of any mission for the State of Indiana. . . . The training flight of Major Layne involved a distinct relationship with and performance of a duty to the United States of America."

Secretary of the Army Brucker, on May 10, 1960, advised the Committee on the Judiciary of the House of Representaives, H. Rept. 1928, 86th Cong., 2d Sess., p. 7:

> "Equipment such as jet aircraft, tanks, and heavy artillery, . . . would seldom if ever be used in accomplishing a State mission."

There must always of necessity be a considerable measure of federal control over Air National Guard units. When the Air National Guard was established, it was done within a framework similar to the Army National Guard, even though there was no genuine connection or relationship between high speed jet aircraft and a state mission. But the courts have always looked to the substance rather than allowing form to cloak reality. If, in fact, federal support were to be withdrawn from the various Air National Guard units, it would mean no federal pay, no airplanes, no fuel, no hangars, no runways, no maintenance mechanics (air technicians), no parts for replacement, no medical care or sickness or death benefits. It would mean no Air National Guard.

We are not unmindful of the fact that various district courts and courts of appeal have held that military members of non-activated National Guard units are employees of the state and not the federal government. In so holding in *Stoner* v. *U.S.*, 251 F. 2d 268

(5th Cir.), cert. den. 356 U.S. 951 (1958), the court observed that so far as holding "members" of the National Guard are federal employees, p. 269:

> "If a proposition so firmly established is to be changed, we think that should be done only by the Supreme Court, and that we should abide by our former decisions."

When the vast scope and extent of federal control over an Air National Guard unit is considered, together with the fact that the daily training area of the unit usually covers several states,[1] that all its equipment is federally owned and federally maintained, that the airplanes it operates travel 400 to 500 miles an hour and in a few minutes time pass over several state boundaries, that these airplanes must be operated and maintained so that in the first hour, in case of emergency, fifty percent of its aircraft must be able to get up in the air fully armed, so as to become an effective and integral part of our nation's first line of defense against foreign attack, 32 U.S.C. § 102, that the Pentagon is now directing that all our military reserve forces be made a part of the National Guard, it is believed that a fresh look should be taken at this whole matter of the status and relationship of a "member" of the Air National Guard to the federal government even when a member of a unit which has not

[1] The Air National Guard operates at large without regard to state boundaries. According to Standing Operating Procedure No. 3, promulgated January 2, 1957, (Defendant's Ex. 3, R. 663-664), the local flying area for the 104th Fighter Interceptor Squadron over which flights were made daily by the squadron McCoy was a member of, included the States of Maryland, Pennsylvania, New Jersey, Delaware and Virginia. The squadron's over-all training area was considered to be in the continental United States. (R. 690).

been "activated," and that it should be held that the member occupies such a dual relationship with the federal as well as the state government that he is an employee of the federal government within the meaning of the Federal Tort Claims Act even when functioning solely as a "member" of a non-activated Guard unit in the course of training.

Congress itself, in the National Guard Act, 32 U.S.C. § 102, describes the Air National Guard as "an integral part of the first line defenses of the United States * * *," the strength and organization of which must be maintained and assured at all times.

And further illustrative of the close federal connection with and control over the Air National Guard is the provision in 32 U.S.C. § 110, that the President shall prescribe regulations, and issue orders necessary to organize, discipline and govern the National Guard.

The notion that members of the National Guard are in no way employees of the United States when the unit has not actually been "activated", disregards the realities of federal supervision and control, and the right of federal supervision and control over virtually all National Guard activities in order that the first line defenses of the United States be maintained and assured at all times.

McCoy was not acting as a military member of the Guard performing military duties at the time of the occurrence. He was acting in the capacity of and doing the working of a supervisory air technician—civilian caretaker of federal airplanes. General Wilson, in charge of the Air National Guard, on active federal duty at the Pentagon, testified that it is desirable that the maintenance officers fly the airplanes

maintained by them and under their supervision to let the others who will fly the planes know the planes are being properly maintained. Of course, this was the only way that the quality of maintenance could ultimately be ascertained, by operating and flying the machines which the federal maintenance personnel were maintaining. But even if McCoy had been acting solely in a military capacity, doing military work at the time of the occurrence, as the 3rd Circuit held, it is submitted that then, under the very broad definition of "employees of the Government", in the Federal Tort Claims Act, 28 U.S.C. § 2671, McCoy should be considered an employee of the United States. Amici curiae do not wish it to be considered, by reason of their argument that McCoy was a federal employee even if only acting as a military member of the Air National Guard, that they adopt the view that McCoy was acting solely in a military capacity. He was not so acting. The evidence supporting the findings of fact of the trial court, and the findings of the trial court, demonstrate that McCoy was acting solely or at least in part in a civilian capacity doing civilian work when injured. However, amici curiae believe the decisions that have held that members of non-activated units of the National Guard, acting in a military capacity were solely employees of the state, have reached a conclusion that does not truly take into account the actual relationship which exists.

CONCLUSION

Both trial courts found that McCoy was actually performing the duties incident to his "civilian caretaker status" at the time of the occurrence. The Court of Appeals for the District of Columbia Circuit affirmed this finding in the Meyer cases, stating, ". . .

in an ultimate sense the right of control was in the Federal Government at the time and in the circumstances of this accident. . . ." The Court of Appeals in that case further held that the flight in question by McCoy "entailed the performance of his caretaker and maintenance duties" and, in the performance of "his property maintenance function . . . the ultimate right of control over him was in the United States."

The accident occurred both within the time and geographic area of McCoy's employment by the United States as a caretaker. He was operating a vehicle owned, maintained and fueled by the United States and was performing an important duty imposed by his employment as a caretaker for the benefit of the United States at the time and place of the collision between the Viscount Airliner and the T-33 Jet.

Finally, the Government admitted in the Meyer cases that McCoy was, at least in part, acting in his civilian capacity at the time of the occurrence. (Brief, Court of Appeals for the District of Columbia Cir., p. 16).

The United States, if a private person, would have been liable under the law of Maryland for injury or death caused by the negligence of McCoy at the time of the occurrence. It is liable for his act, on the basis of that test, under the Federal Tort Claims Act, 28 U.S.C. § 1346(b).

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 345

STATE OF MARYLAND, FOR THE USE OF NADINE Y. LEVIN, ET AL., AND STATE OF MARYLAND FOR THE USE OF SIDNEY L. JOHNS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the court of appeals (R. 708) are reported at 329 F. 2d 722. The opinion of the district court (R. 691) is reported at 200 F. Supp. 475.

JURISDICTION

The judgments of the court of appeals were entered on April 1, 1964, and a timely petition for rehearing was denied on April 28, 1964 (R. 731-732, 733). On June 23, 1964, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including September 25, 1964 (R. 734). The petition was filed on August 3, 1964, and was granted on Oc-

tober 19, 1964 (R. 734; 379 U.S. 877). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the United States is liable under the Federal Tort Claims Act for the negligence of a pilot who is both a commissioned officer and a civilian employee of the Maryland Air National Guard.

CONSTITUTION, STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Constitution, statutes and regulations involved are set forth in the appendix to this brief, pp. 61–67, *infra*.

STATEMENT

On May 20, 1958, a passenger airplane owned by Capital Airlines collided over Brunswick, Maryland, with a jet trainer airplane owned by the United States and assigned to the Air National Guard of Maryland. Both airplanes were destroyed and all of the passengers and crew were killed except for the pilot of the National Guard aircraft, Julius R. McCoy. At the time of the accident, McCoy was both a commissioned officer in the Maryland Air National Guard and a civilian employee of the National Guard receiving pay from federal funds under Section 90 of the National Defense Act of 1916, as amended, 32 U.S.C. 709. These suits were brought under the Federal Tort Claims Act by survivors of two of the Capital passengers seeking to impose liability upon the United States because of McCoy's negligence. A finding of liability in the district court, 200 F. Supp. 475, was reversed by the court of appeals, 329 F. 2d 722.

In this Court the United States does not challenge the finding of the district court that McCoy's negligence was responsible for the accident. The issue here, as in the court of appeals, is whether, assuming McCoy to have been negligent, he was, under the Tort Claims Act, an "employee" of the United States "acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of" Maryland. The relevant facts, therefore, principally concern (1) the extent of the supervision and control exercised by the federal government over National Guard officers and caretakers in general, and (2) the particular duties performed by pilot McCoy at the time of the accident. They may be briefly summarized as follows:

Julius R. McCoy held a commission from the Governor of Maryland as a Captain in the Air National Guard of Maryland (R. 92, 660). A rated pilot on flying status, he was assigned as a jet fighter pilot to the 104th Fighter-Interceptor Squadron of the Guard, stationed at Martin Field, near Baltimore (R. 37, 661). He served in that capacity as aircraft maintenance officer of the squadron (R. 38). At no relevant time was that squadron in active federal service (R. 283).

Captain McCoy was also employed as a civilian air technician with the title of Aircraft Maintenance Chief and Acting Maintenance Supervisor. In this position he was responsible for the proper maintenance of the 28 airplanes owned by the United

States which were assigned to the 104th Squadron, and had authority over the 60 to 65 employees who were engaged in the maintenance and care of the 28 airplanes (R. 681). Although the Air Maintenance Chief was not required to be a rated pilot on flying status (nor was such a qualification listed as "desirable" [ANGM 40–41, p. 107; R. 118, 218]), Captain McCoy had performed functional flight tests or flight checks after major maintenance work on airplanes assigned to his unit (R. 70–71).

As a pilot member of the National Guard, Captain McCoy was required to fly 100 hours annually to maintain proficiency (R. 161–162, 300–301). Although that requirement was a federal one, the times, routes and methods of performing such flights were controlled by State officers acting under authority delegated from the governors (R. 283–285, 337–338). Proficiency flights of the 104th Squadron were often made separately from the organized drills (which were on alternate Saturdays), both by those officers who were air technicians and by other pilots of the unit (R. 68). Although air technicians were on civilian pay status during their regular working week, if they flew proficiency flights at such times they received flight pay in their military capacity (and none in their civilian capacity), unless they had already qualified for all the flight pay they were entitled to receive for the period (R. 153–154). Should a pilot fly after he had already qualified for all of his flight pay, he was, when flying, considered to be on military duty training status without military pay, although he was permitted to receive civilian pay for

the period of the flight (R. 127, 155, 156). Only officers of the Air National Guard and other military personnel were permitted to fly airplanes assigned to it and they were authorized to fly only on valid military orders (R. 304). The commanding officer and pilots of the 104th Squadron, and a ranking officer of the Air National Guard, understood that when an officer pilot who was also a civilian air technician flew a National Guard airplane, he did so in his military capacity (R. 332, 117–118, 147, 149).[1]

The flight which resulted in the accident involved in the present case came about as follows. Captain McCoy had requested permission from his commanding officer, Lt. Col. Kilkowski,[2] to take an acquaintance, Donald Chalmers, as a passenger on a flight, with a view to increasing his interest in joining the Maryland Air National Guard (R. 68, 83, 139). The day of the crash, May 20, Col. Kilkowski authorized Captain McCoy to make such a flight with Chalmers

[1] Captain McCoy's testimony is illustrative. When asked what functions he performed "[d]uring proficiency flight as a maintenance chief" air technician, he replied, "I would not be on a flight in duty as a maintenance chief. I would be on the flight in my duty as a captain in the Air National Guard * * *" (R. 117).

[2] Petitioners' assertion that McCoy took his orders in his military status from Major Scott (Pet. Brief, p. 16) is inaccurate. He concededly took his orders in that capacity from the commanding officer of the 104th Squadron, and it is clear from the record that Col. Kilkowski was the commanding officer of the squadron at all times material to this case, as well as Base Detachment Commander in charge of air technicians on the base (R. 122, 578–579, 594; compare R. 42). As Base Detachment Commander, as well as commanding officer of the squadron, he received orders from and was responsible to the Adjutant General of Maryland (R. 145).

(R. 139, 151). The flight order was issued by authority of the commanding officer of the 104th Fighter Squadron. It directed Captain McCoy to make a proficiency or training flight and specified the date of departure, the airplane to be used, and the destination (R. 209, 108, 150–151, 586–587, 161–162; see R. 207).[3] Because of the passenger, the flight was made in one of the unit's two training airplanes, rather than in a fighter (*ibid.*).

Captain McCoy had already qualified for all of the military flight pay which he was entitled to receive for the pay period in question. Since the flight occurred during a day in which he was employed as an air technician, he drew compensation during the period of the flight in his civilian capacity as an air technician (R. 599).[4] Accordingly, he flew the airplane on military training duty status, without mili-

[3] Petitioners' assertion that the flight "was not a training mission" (Pet. Brief, p. 17) is incorrect, as shown above. The pages of the record cited by petitioners for that statement insofar as they relate to the subject at all (R. 136, 152–153, 586–587) support only the proposition that the flight was not "a flying training period * * * for military pay purposes" (R. 136). The evidence of record discloses that a "flying training period" is a paykeeping term (R. 154), and as we have shown above, the flight here would have been such a period for pay purposes except for the fact that Captain McCoy had qualified for the maximum number of flight pay periods for the period of time in question (R. 154–155).

[4] Pilots who are air technicians receive flight pay in their military, rather than their civilian, capacity for any proficiency flights they undertake, even during their regular civilian working hours, unless they have already received the maximum amount of flight pay for the period (R. 153–155; see pp. 4–5, *supra*).

tary pay (R. 127, 155; p. 45, *supra*). The flight had no specific maintenance function or purpose (R. 163) and no check flight or other maintenance flight would have been authorized with a passenger aboard (R. 164). As a maintenance officer, however, Captain McCoy observed matters such as the quality of the performance of the aircraft and its instruments, and the air strips as "a secondary portion of any flight" (R. 163–164).

Before the present actions were begun, similar actions (the "*Meyer* cases") had been brought against the United States on the same theory in the United States District Court for the District of Columbia by Capital Airlines and the survivors of the pilot and copilot of the Capital airplane.[5] That court found that at the time of the accident "Captain McCoy was at least in part carrying out his civilian work as Aircraft Maintenance Chief and Acting Maintenance Supervisor" (R. 687). The court ruled as a matter of law that a "person employed as an air technician (caretaker) in a non-activated National Guard Unit is an employee of the United States within the meaning of the Federal Tort Claims Act" (R. 688).

By agreement of the parties, the record made in the *Meyer* cases on the issue of the responsibility of the United States for the conduct of Captain McCoy was filed in these cases. Petitioners did not, however, assert that the rulings or judgment in the *Meyer* cases were binding upon the government under principles of res judicata or collateral estoppel. The district

[5] Actions arising out of the same collision have also been filed in Illinois, Ohio and New York.

court in these cases did not consider the judgment in the *Meyer* cases to be binding, nor did it refer to that judgment expressly in holding the United States liable.

The United States appealed to the Court of Appeals for the Third Circuit from the judgments in these cases and to the Court of Appeals for the District of Columbia Circuit from the judgments in the *Meyer* cases. The Court of Appeals for the District of Columbia Circuit rendered its decision first and affirmed on the issue of liability, holding that Captain McCoy was an employee of the United States, and that the very existence of an employer-employee relationship gave the United States the right to control his activities "in an ultimate sense." *United States* v. *State of Maryland, for the Use of Meyer,* 322 F. 2d 1009. A timely petition for certiorari from that decision was denied on December 16, 1963, 375 U.S. 954, but the case is presently pending upon the government's motion for leave to file petition for rehearing, No. 543, O.T. 1963.

The Court of Appeals for the Third Circuit, Judge Staley dissenting, reversed the judgments of the district court in the present cases (R. 708–732). Judge Smith's opinion held that civilian employees of the National Guard are not employees of the federal government within the meaning of the Tort Claims Act, since they, like the Guard's military employees, are subject to the supervision and direction of State officials who are, in turn, responsible to the directions of State governors (R. 714–721).

Alternatively, Judge Smith held that Captain McCoy was flying the airplane "within his line of duty as a member of the Guard," and was acting at that time, "under the control and supervision of the authorized military personnel of the Maryland Air National Guard." Consequently, the United States would not be liable for Captain McCoy's conduct under the Maryland doctrine of *respondeat superior* since that doctrine applies only if the employer directs and controls the employee with respect to the very activity from which the injury arises (R. 721–722, 723).[6] In a concurring opinion, Judge Hastie agreed that the "basic character" of the flight in question was that of a training flight "undertaken by Captain McCoy in his capacity as an officer of the Maryland Air National Guard," but did not reach the question whether civilian employees are to be treated differently from military employees of the National Guard (R. 725). Judge Staley dissented primarily upon the

[6] The opinion of the court noted that less than usual weight should be given to the findings of the district court in this case because the district court record consisted of the record made in the District of Columbia which, in turn, consisted primarily of depositions and written exhibits (R. 709–710). The court did not, however, find it necessary to set aside any specific district court finding. We believe that the factual analysis made by the court of appeals is consistent with the basic findings made by the District Court for the District of Columbia in the *Meyer* cases and with those of the district court in these cases, except insofar as the district court in these cases implied that Captain McCoy was flying the airplane exclusively or primarily as an air technician. Insofar as they so implied, they were inconsistent with the findings of the district court and the ruling of the court of appeals in *Meyer*, and were clearly erroneous.

reasoning of the Court of Appeals for the District of Columbia Circuit in the *Meyer* cases (R. 726–730). Petitioners' timely petition for rehearing *en banc* was denied by a vote of six-to-one (R. 733).

SUMMARY OF ARGUMENT

The United States may be held liable under the Federal Tort Claims Act for the negligence of Captain McCoy only if he was an "employee of the Government" and if his conduct in that capacity was such as to impose liability under State law upon a private employer in the United States' position. We contend that Captain McCoy was not, under the applicable principles of agency law, an employee of the United States in his capacities as a military member and civilian technician of the Maryland National Guard. Alternatively, even if he was an employee of the federal government for some purposes, he was not subject to any federal direction or control or engaged in any function of the federal government while performing the flight which gave rise to petitioners' claims.

1. Article I, Section 8 of the Constitution reserves to the States the right to appoint officers and to train the "Militia." The Army and Air Force National Guard are nothing more than the "Militia" referred to in that clause. The National Guard as we know it today is a State-controlled and State-operated militia which is subsidized, in large part, by federal funds and which may be called into federal service by the President. As a condition of such federal subsidies, the governing statute authorizes the establishment of federal standards which must be met by the State agencies, but the actual supervision and

direction of each State's Guard units remain with State officials. The ranking officers are the adjutants general of the States, and they are responsible only to the State governors. Consequently, the relationship between the United States and the Guard of each State, like the relationship between the federal government and a host of other State agencies performing local functions with the assistance of federal funds, is essentially that of a party and an independent contractor. Just as the employees of independent contractors who deal with the United States are not employees of the government for Tort Claims Act purposes, so, too, members of the National Guard are outside the coverage of the Tort Claims Act. In providing an administrative and legislative remedy in 1960 for injuries caused by the negligent act of all Guard personnel, Congress approved the court decisions which had held that military Guard personnel were State and not federal employees because they were under the "command and control" of State authorities.

There is a line of court of appeals' decisions (which we challenge) holding that civilian Guard personnel are employees of the United States for purposes of vicarious tort liability. However, the history of the statute authorizing payment from federal funds for such employees, as well as the regulations issued thereunder, the actual administrative understanding and practice, and other Congressional legislation all indicate that Congress considered civilian personnel as State employees and that they are actually as much under State "command and control" as military

Guard members. Indeed, by including civilian personnel among those for whose negligence an administrative remedy was supplied in 1960, Congress demonstrated that civilian and military personnel of the Guard should be treated alike and that no remedy under the Tort Claims Act should be available for the conduct of such employees.

2. Alternatively, even if Captain McCoy was an employee of the United States in his capacity as a civilian technician of the Guard, he was employed by the State of Maryland insofar as he performed military duties. Hence he was at most a "shared" or "borrowed" servant. The flight which produced the accident on which these claims are based was a military flight because only military personnel were authorized to make it and because it was done under military orders. Only the State of Maryland could direct the pilot when, where and how to fly; hence only the State of Maryland could be held liable—under that State's law of *respondeat superior*—for conduct negligently performed while it had the power to control such conduct. The incidental civilian technician functions performed by Captain McCoy while in the air did not detract from the primary capacity in which the flight was made, and, in any event, even the civilian duties were carried out under the direction and control of the State.

3. Finally, there is no merit to petitioners' claims that they are entitled to prevail because other litigants suing in the District of Columbia for damages aris-

ing out of this accident obtained final judgments against the United States in their cases. This claim was not timely asserted. Moreover, the novel doctrine of collateral estoppel which petitioners now raise would produce patently unfair results and should be rejected.

ARGUMENT

This case concerns the liability of the United States, under the Federal Tort Claims Act and the doctrine of *respondeat superior*, for the conduct of Captain Julius R. McCoy, a pilot who was, at the same time, a commissioned officer and a civilian employee of the Maryland Air National Guard. Because of a consistent line of decisions in the courts of appeals which have distinguished, for Tort Claims Act purposes, between military and civilian employees of the National Guard and have held only the latter to be employees of the United States for purposes of that Act, the district court in this case—as in *United States* v. *State of Maryland, for the Use of Meyer*, 322 F. 2d 1009 (C.A. D.C.), pending as No. 543, O.T. 1963 (which arose out of the same mid-air collision)—believed it essential to determine whether Captain McCoy was acting in a civilian or military capacity at the time of the collision. The majority of the court of appeals ruled that McCoy was acting primarily in his military capacity and was acting under the exclusive control and direction of State officials (R. 723–724, 725).

We contend first that the decisions holding the United States liable for acts committed by civilian employees of the Guard are in error, and that the

distinction drawn between these cases and those involving military personnel is, as Judge Smith observed below, "untenable" (R. 716). (In using the term "*Guard*" throughout the brief, we refer to units of the National Guard not in active federal service.) Consequently, it is immaterial whether Captain McCoy was engaged in civilian or military duties while piloting the trainer plane involved in this collision. In either event, his negligence is not attributable to the United States. For, as in his military capacity, McCoy as a civilian was under the direction and control of the State of Maryland at the time of the collision and was not, therefore, an "employee of the Government" within the meaning of the Tort Claims Act.

Alternatively, we submit that the court of appeals was correct in ruling that Captain McCoy was engaged primarily in military duties when he was flying the jet trainer airplane, and was under the exclusive direction and supervision of State officials. Accordingly, even if he was an employee of the United States for purposes of the Tort Claims Act because of his civilian duties, no federal official had the right to direct him to fly or to control him in the performance of his flight. Since, under Maryland law, the employer who has the right to control the particular activity which results in the accident is the only one who may be held liable under the doctrine of *respondeat superior*, and since the State and not the federal government directed the pilot's military activities, liability for the pilot's negligence in this case cannot attach to the United States.

I

THE UNITED STATES IS NOT LIABLE FOR THE PILOT'S NEGLIGENCE BECAUSE CIVILIAN GUARD PERSONNEL ARE NOT "EMPLOYEES OF THE GOVERNMENT" WITHIN THE MEANING OF THE FEDERAL TORT CLAIMS ACT

Under the Federal Tort Claims Act, 28 U.S.C. 1346 (b) (pp. 61–62, *infra*), the United States has assumed liability for negligent acts or omissions of any "employee of the Government" who is "acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." In applying this statute to military personnel of the National Guard, the federal courts have uniformly held that so long as such personnel are not in active federal service and therefore are not under the immediate direction of federal officials, they are to be considered employees of the States rather than employees of the United States. *Williams v. United States,* 189 F. 2d 607 (C.A. 10); *Dover* v. *United States,* 192 F. 2d 431 (C.A. 5); *McCranie* v. *United States,* 199 F. 2d 581 (C.A. 5); *Storer Broadcasting Co.* v. *United States,* 251 F. 2d 268 (C.A. 5), certiorari denied, 356 U.S. 951; *Bristow* v. *United States,* 309 F. 2d 465 (C.A. 6); *Pattno* v. *United States,* 311 F. 2d 604 (C.A. 10), certiorari denied, 373 U.S. 911; *Blackwell* v. *United States,* 321 F. 2d 96 (C.A. 5); *Mackay* v. *United States,* 88 F. Supp. 696 (D. Conn.); *Glasgow* v. *United States,* 95 F. Supp. 213 (N.D. Ala.); *Satcher* v. *United States,* 101 F. Supp. 919 (W.D. S.C.); *Larkin* v. *United*

States, 118 F. Supp. 435 (N.D. N.Y.); *Gross* v. *United States,* 177 F. Supp. 766 (E.D. N.Y.).[7]

In this respect the courts have distinguished between military and civilian personnel of the Guard. Civilian employees, who receive compensation from federal funds pursuant to 32 U.S.C. 709(f), have been held to be federal employees for Tort Claims Act purposes. *United States* v. *Holly,* 192 F. 2d 221 (C.A. 10); *Elmo* v. *United States,* 197 F. 2d 230 (C.A. 5); *United States* v. *Duncan,* 197 F. 2d 233 (C.A. 5); *Courtney* v. *United States,* 230 F. 2d 112 (C.A. 2); *United States* v. *Wendt,* 242 F. 2d 854 (C.A. 9); cf. *Pattno* v. *United States,* 311 F. 2d 604 (C.A. 10), certiorari denied, 373 U.S. 911. We believe, for the reasons stated below, that this distinction is unsound, and that the general structure of the National Guard, the legislative history of the caretaker provision, subsequent Congressional enactments and the actual administrative practice and interpretation all establish that civilian employees of the Guard, like military personnel, are not employees of the United States for purposes of vicarious tort liability.

A. THE GUARD IS BASICALLY A STATE-CONTROLLED AND STATE-OPERATED MILITIA

The unbroken line of decisions which have held that non-civilian members of Guard units are not employees

[7] *O'Toole* v. *United States,* 206 F. 2d 912 (C.A. 3), was a case in which members of the National Guard of the District of Columbia were held to be federal employees, because that organization is under the direct command of the President, who appoints its officers and who, through a direct chain of command, controls its activities.

of the United States (pp. 15–16, *supra*) rests upon ordinary principles of agency law which have been approved and considered applicable to this situation in the course of Congress' consideration of the problem. The common-law principle of vicarious tort liability upon which are based the United States' obligations under the Tort Claims Act is rooted in the employer's right to control his employees' activities. *E.g., Restatement, Agency 2d,* § 219, comment a. Liability for tort under the doctrine of *respondeat superior* is premised upon the employer's right to control and supervise the manner in which his employees' duties are to be performed as well as to direct the ultimate result to be achieved. *Id.,* § 220 (1); *Singer Mfg. Co.* v. *Rahn,* 132 U.S. 518. The history of the National Guard, its present function, and its organizational structure demonstrate that although the Guard is supported in large part by federal funds, it is administered, controlled and supervised by the States. Hence, under the applicable master-servant principles, its employees' negligent conduct may be attributed to the States but not to the federal government.

1. The Army National Guard and Air Force National Guard are the "Militia" authorized by Article I, Section 8, of the Constitution"[8]

> The Congress shall have Power * * *
> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

[8] 32 U.S.C. 101(4), (6). (p. 63, *infra*).

> To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress; * * *

In first exercising the militia power, Congress prescribed only the organization and discipline of the militia, but it subsequently supplied arms and equipment. Since the beginning of this century, when the term "National Guard" came into use, Congress has also provided funds for the compensation of militia members and civilian employees.[9a] The basic structure of the National Guard as it is known today was formulated by the National Defense Act of 1916, now 32 U.S.C. 101, *et seq.*

The 1916 enactment first embodied Congress' fundamental decision to use the organized State militia as a basic source of reserve military strength for the nation in place of a standing regular army or national force of volunteer reserves. H. Rep. No. 297, 64th Cong., 1st Sess. (1916), pp. 2–9, 14; see Wiener, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181, 196–203 (1940). Congress not only provided for the arming, organization and discipline of the National Guard, but authorized the use of federal funds for the compensation of its officers if members of the

[9a] There were, of course, civilian employees of the militia long before Congress authorized the use of federal funds for their pay. *E.g.*, Act of Maryland General Assembly, 1678, 7 Archives of Maryland (Md. Hist. Society 1889) 59; Maryland Rev. Code of 1878, Art. 18, §§ 28–33.

Guard units and their officers met federally prescribed standards.[9]

The 1916 act contemplated that the National Guard would be (1) a State militia under the command and direction of the State except when called into federal service, and (2) a reserve component of the national forces which, when ordered into active federal service, would constitute an integral part of the Army of the United States. The Act made it perfectly clear that the States are to retain command and control over the National Guard when it is not in active federal service.[10] The basic features of the National Guard and its relationship to the State and national governments have remained substantially the same as prescribed by the National Defense Act of 1916.

Guard units qualify for federal support under the Act only if they maintain "federal recognition" by participating in federally prescribed drills and training and by passing inspections designed to assure that their members, organizations, training, instruction and property meet prescribed federal standards. 32 U.S.C. 105, 108, 502. Equipment and supplies assigned to the Guard remain the property of the United States, but the States have the responsibility for their maintenance and care. 32 U.S.C. 105(a)(1), 702, 710(c); R. 287–288. Both the Constitution and the

[9] See, *e.g.*, 53 Cong. Rec. 4356.

[10] See, *e.g.*, Section 61, now 32 U.S.C. 109(b), *infra*, p. 65. The Act, as described by one of its supporters, "allows the State to retain control of its organization while the Government aids in preparing it in efficiency." 53 Cong. Rec. 4356. One of its opponents remarked that, under the proposed legislation, "the State governors shall continue to command these 48 little armies while the Nation pays a big share of the bill." 53 Cong. Rec. 4341.

governing statute provide that the selection and recruitment of Guard personnel and the direct supervision of their training and activities are reserved to the States and to State officials, except for those parts of the militia "employed in the Service of the United States." Constitution, Art. I, Sec. 8, Cl. 16; 32 U.S.C. 101(4) and (6), 501; R. 290.

In actual practice, therefore, State officials have the right to select and hire Guard personnel, to promote and discharge them, to determine the amount of pay and retirement and disability benefits for civilian employees, and to supervise and direct the activities of all Guard personnel.

The ranking officer of each State Guard is usually called the adjutant general, who is a State official appointed under State law. *E.g.*, Md. Code, Art. 65, §§ 9–10, p. 71, *infra*; see *Hyde* v. *United States*, 139 F. Supp. 752 (Ct. Cl.). While the office of adjutant general of the State militia has been prescribed by federal statute since 1792,[11] the statute itself makes clear that the office is a State office, with almost exclusively State duties. 32 U.S.C. 314, pp. 65–66, *infra*. In its present form it provides that "There shall be an adjutant general in each State * * * [who] shall perfrom the duties prescribed by the laws of that jurisdiction." 32 U.S.C. 314(a), p. 65, *infra*.[12] The statute provides that the President shall appoint the adjutant general of each territory and of the District of Columbia, thereby implying that each State is to provide its own

[11] Act of May 8, 1792, 1 Stat. 271.

[12] Originally, the statute provided that it would be his duty "to distribute all orders from the commander-in-chief of the State to the several corps." 1 Stat. 271, 273.

officer to fill the post. 32 U.S.C. 314 (b), (c). The only federal duty imposed upon the adjutants general is to make returns and reports to the Secretaries, which are, in turn, to be made available to Congress. 32 U.S.C. 314(d). In most States, the adjutant general is the advisor to the governor on matters pertaining to the Guard (R. 294), and in many instances the adjutant general is an officer who is not federally recognized and who receives pay exclusively from the State (R. 288–291).

The laws of Maryland illustrate the duties of the adjutants general and their relationship to the governor. The office of adjutant general may be filled in Maryland only by appointment of the governor with advice and consent of the State Senate (Md. Code, Art. 65, § 9). The governor, who is commander-in-chief of the militia (Const. Art. II; Md. Code, Art. 65, § 6), may appoint the adjutant general to be chief of staff (*id.* § 9) or ranking line officer (*id.* § 10), in which capacity he would be "in control of the Military Department of the State, and subordinate only to the Governor in matters pertaining to said department." *Ibid.* Thus, in Maryland, as elsewhere, the adjutant general is subordinate only to the governor of the State, and not to any federal official. And since the governor has the ultimate responsibility for the supervision, direction and control of Guard members in his State, such military personnel cannot be considered employees of the federal government for Tort Claims Act purposes. See *Harris* v. *Boreham;* 223 F. 2d 110 (C.A. 3); *Lavitt* v. *United States,* 177 F. 2d 627 (C.A. 2).

2. The fact that the federal government prescribes conditions for federal support does not mean that Guard personnel are employees of the United States for Tort Claims Act purposes. For the federal government carries out many of its objectives by means of arrangements with independent contractors whereby not only the object to be attained and the work to be done is prescribed but stringent standards and detailed specifications are also enumerated. Notwithstanding such indirect governmental "control" over a contractor's employees, the Tort Claims Act excludes independent contractors from the definition of "employee[s] of the government." 28 U.S.C. 2671, p. 62, *infra; Strangi* v. *United States,* 211 F. 2d 305, 308 (C.A. 5); see *United States* v. *Silk,* 331 U.S. 704, 712.

State employees under federally subsidized programs such as the Guard are analogous to employees of independent contractors under cost-reimbursable contracts. In both situations the federal government furnishes the funds, prescribes the objectives, fixes standards and specifications, and retains the right of inspection. But both States and independent contractors administer their programs on a day-to-day basis, and retain the rights to supervise and direct their employees, to give work assignments, to fix working conditions, and to select, promote and discharge the employees.

There are a host of programs in which the federal government supplies all or most of the funds, but which are administered by the States in accordance

with federal standards.[13] As Judge Smith noted below, the Guard is a "classic" example of a program "in which the Congress has undertaken the financial support of a state activity in the national interest, on condition that the activity conform to the congressional enactments and the regulations promulgated thereunder" (R. 720). The fact that a State employee's

[13] 1. Agricultural research.
2. Cooperative agricultural extension work.
3. Agricultural marketing services.
4. Donations of surplus agricultural commodities.
5. Resident instruction at land-grant colleges.
6. Airport construction.
7. Highways.
8. Civil defense equipment and supplies.
9. Natural disaster relief.
10. School lunches.
11. School construction in federally affected areas.
12. School operation and maintenance in federally affected areas.
13. Vocational education.
14. Public health services.
15. Construction of health facilities.
16. Crippled children's services.
17. Maternal and child health services.
18. Poliomyelitis vaccination.
19. Public assistance.
20. Child welfare services.
21. Vocational rehabilitation.
22. Employment security.
23. Low-rent public housing.
24. Slum clearance and urban renewal.
25. Fish and wildlife restoration and management.
26. State and private forestry cooperation.

See *Report of the Commission on Intergovernmental Relations*, 84th Cong., 1st Sess., H. Doc. 198, June 28, 1955, p. 301; *A Description of Twenty-five Federal Grant-in-Aid Programs*, a report submitted to the Commission on Intergovernmental Relations, June 1955, p. 178.

income is derived from federal funds should not make him an employee of the United States for purposes of vicarious liability under the Tort Claims Act.

3. In rejecting a bill to extend the coverage of the Tort Claims Act to Guard personnel, Congress, in 1960, approved the decisions which had held that the United States was not vicariously liable for the negligent conduct of Guard employees. The Senate Report which accompanied a substitute proposal to provide an administrative procedure for the settlement of tort claims arising out of Guard activities observed that "members of the National Guard not in active Federal service have been held not to be employees of the United States within the meaning of the Federal Tort Claims Act * * *." S. Rep. No. 1502, 86th Cong., 2d Sess. (1960), p. 3. The committee explained that "[t]he crux of this matter lies in the fact that the National Guard is primarily under State control, as opposed to Federal control. The training of its members is primarily that of the State, except, of course, when the National Guard is federalized or called into Federal service." *Id.* at p. 4. The House Committee also observed that "it is not appropriate to grant judicial relief against the United States under the Federal Tort Claims Act" in this situation because "Federal authorities do not have command and control over National Guard units and members not in active Federal Service." H. Rep. No. 1928, 86th Cong., 2d Sess. (1960), p. 4; see Hearings before Subcommittee No. 2 of the House Committee on the Judiciary on H.R. 5435 and H.R. 9315 (1960). Hence Congress ratified the previous understanding

of the courts that military personnel of the Guard were not covered by the Tort Claims Act.

Indeed, the terms of the Tort Claims Act itself demonstrate that Guard members are excluded from its scope. That statute defines "employee of the government" to include "officers and employees of any Federal agency, members of the military or naval forces of the United States" and others "in the Service of the United States." 28 U.S.C. 2671. At the time of the passage of the Tort Claims Act, Section 58 of the National Defense Act, as amended, provided that members of the National Guard "shall not be in the active service of the United States except when ordered thereto" and that they were otherwise to be administered, armed and trained in their status as the National Guard of the various States." Since the present 10 U.S.C. 3078 expressly makes the Army National Guard a "component of the Army" only "while in the service of the United States,"[14] it seems clear that Guard members are not "members of the military or naval forces of the United States" or otherwise "in the service of the United States." The clarity of the statutory language, as well as Congress' adoption of the rule applied consistently in the federal courts before 1960, bars any claim (see Pet. Br. 56–58) that military personnel of the Guard are "employees of the government" for Tort Claims Act purposes.

[14] These provisions, formerly 32 U.S.C. 4, now appear in somewhat revised form in 10 U.S.C. 3495, 3079, 8495 and 8079.

B. CIVILIAN PERSONNEL OF GUARD UNITS ARE UNDER THE CONTROL AND DIRECTION OF THE STATE AND WERE REGARDED BY CONGRESS AS STATE EMPLOYEES

In his civilian capacity, Captain McCoy was employed to supervise the maintenance and care of 28 airplanes which were owned by the United States and had been assigned to the 104th Fighter-Interceptor Squadron of the Maryland Air National Guard (R. 681). Pay from federal funds for employment in this capacity was authorized by 32 U.S.C. 709, which was originally enacted as Section 90 of the National Defense Act of 1916 and which has come to be known as the "caretaker" statute. A line of decisions beginning with *United States* v. *Holly*, 192 F. 2d 221 (C.A. 10) has held that Guard personnel employed under this statute, unlike military personnel, are employees of the United States for Tort Claims Act purposes. See cases cited at p. 16, *supra*. We believe that this distinction is unsound, and that Guard personnel—whether military or civilian—are, like other State employees, outside the coverage of the Tort Claims Act. Consequently, even if Captain McCoy had been acting solely in a civilian capacity during the flight involved in this case, his negligence would not be attributable to the United States.

(1) *The statute and regulations.*—In its present form, the "caretaker" statute authorizes the Secretary of the Army (for the Army National Guard) or the Secretary of the Air Force (for the Air Force National Guard) to spend funds allotted for the Guard "for the compensation of competent persons to care for material, armament, and equipment" of the Guard, and to perform "clerical" and "other duties." 32

U.S.C. 709(a), pp. 66–67, *infra*. Commissioned officers as well as enlisted men may be so employed (32 U.S.C. 709(d), p. 67, *infra*) and the Secretaries are authorized to "fix the salaries" of such employees, and to "designate the person to employ them." 32 U.S.C. 709(f), pp. 67–68, *infra*. Captain McCoy received pay under this statute as an air technician (R. 681).

The regulations promulgated by the Secretaries pursuant to the caretaker statute designate the adjutants general of the States as the persons authorized to employ personnel under the statute. NGR 51, par. 3; ANGR 40–01, par. 3b, pp. 73–74, *infra*. The regulations refer to the employees so hired as "civilian personnel" of the Guard. See ANGR 40–01, par. 5a; NGR 51, par. 4b. They are utilized in the administration, supply, operations, training, and maintenance of the Guard. ANGR 40–01, par. 2a. The authority to supervise and to discharge such employees, to fix their rates of pay and to establish work hours is placed in the State adjutants general, and State officials also determine promotions, grade and status for the individual employees. NGR 51, par. 3; ANGR 40–01, par. 3b. Federal officers have no command authority or control over these employees and no federal officers or agencies have authority to promote or discharge them, to give them orders, or to control or supervise or assign their daily work (R. 295–296). Civilian personnel of the Guard hired under the caretaker statute are not covered by the federal civil service statutes or the Federal Civil Service Retirement System. The regulations declare these civilian employees of the Air National Guard "to be employees of the State." ANGR, par. 4; see also par. 5a, 21a. Accord NGR 51, par. 4b.

With minor exceptions, the regulations provide that the civilian personnel of the Guard hired under the caretaker statute are to be selected from members of the National Guard of the State. They are to occupy the military table of organization position most comparable to their civilian position so that they will perform duties in their civilian employment which they would be required to perform in their military status if mobilized and ordered into active service. NGR 51, par. 5a and 5e; ANGR 40–01, Sec. 1, par. 2b and 2c. These civilian personnel constitute approximately 19 percent of the total personnel of the Air National Guard and are generally "key personnel" (R. 292–293). A majority of them are enlisted men, but officers hold positions as base commanders, training supervisors, and supply and maintenance officers (R. 293).

(2) *History of the statute.*—The caretaker provision was initially adopted as a part of the plan to provide federal funds for the equipment and compensation of the Guard when, in the National Defense Act of 1916, it was determined to set federally prescribed standards for the State militia and to use it in place of a federal reserve force. Section 90 of the 1916 Act provided (39 Stat. 205–206):

> Funds allotted by the Secretary of War for the support of the National Guard shall be available * * * for the compensation of competent help for the care of the material, animals, and equipment thereof, under such regulations as the Secretary of War may prescribe: *Provided*, That the men to be compensated, not to exceed five for each battery or troop, shall be duly en-

> listed therein and shall be detailed by the battery or troop commander, under such regulations as the Secretary of War may prescribe, and shall be paid by the United States disbursing officer in each State, Territory, and the District of Columbia.

It appears from this initial enactment that the caretaker statute contemplated the use of federal funds for the compensation of enlisted members of units of the Guard, who were to be selected ("detailed") by the commanding officer of each unit for full-time employment in caring for the unit's equipment. While providing for the expenditure of federal funds under federal regulations, the statute prescribed that the persons receiving them were to be members of the State militia selected by a State official (the commanding officer) to perform a State function (the maintenance and care of the unit's equipment, Secs. 82–89, 39 Stat. 203–205, now found at 32 U.S.C. 105(a), 702 (a), (d), 710(e)). As originally drafted, therefore, Section 90 clearly related only to employees of the State. That was the ruling of those administering the Act when it was new. 27 Comp. Dec. 344, 345 (1920).

Section 90 was amended several times in the two decades following its enactment to increase the number of caretakers and their functions,[15] but the basic

[15] Act of June 4, 1920, ch. 227, subch. I, § 46, 41 Stat. 783; Act of March 1, 1922, ch. 90, 42 Stat. 401; Act of June 6, 1924, ch. 275, § 5, 43 Stat. 471; Act of May 28, 1926, ch. 417, § 1, 44 Stat. 673–674; Act of April 21, 1928, ch. 397, 45 Stat. 440; Act of June 19, 1935, ch. 277, 49 Stat. 392; Act of October 14, 1940, ch. 875, § 1, 54 Stat. 1134. The provisions were revised and codified by the Act of August 10, 1956, ch. 1041, § 2, 70A Stat. 614.

relationships established by the statute remain unchanged. Two of the amendments are pertinent to the problem presented here. In 1926 Congress authorized, for the first time, the compensation of Guard officers for full-time civilian employment. Act of May 28, 1926, ch. 417, § 1, 44 Stat. 673, 32 U.S.C. 709(d). The authorization was limited to air squadrons, and to one officer per squadron. The purposes of the amendments were to secure the more efficient maintenance and care of airplanes, and to provide "an officer constantly on duty * * * for the supervision of flying training." H. Rep. No. 1031, 69th Cong., 1st Sess., p. 3; S. Rep. No. 785, 69th Cong., 1st Sess., p. 1. Thus, the first officers of the Guard to occupy a civilian or air technician status were to perform in that capacity a function (conduct of training) reserved to the States by the Constitution (Art. I, Sec. 8, cl. 16) and by statute (Section 91 of the National Defense Act of 1916, 39 Stat. 206, now 32 U.S.C. 501(b)). Nothing in the statute or legislative history indicates that Congress intended this State function to be performed by a federal employee. It is, therefore, most reasonable to assume that in 1926, as in 1916, Congress considered the members of the Guard "detailed" for caretaker employment by their organization commander to be full-time civilian employees of the State, and not agents of the federal government.

The second relevant amendment dealt with the statutory provision that the "caretakers" were to be "detailed" by the commander of the organization having custody of the equipment. In 1935, at the

request of the National Guard Association and the adjutants general of the States, Congress authorized the pooling of caretakers by providing that the Secretary designate "by whom they shall be employed." Act of June 19, 1935, ch. 277, 49 Stat. 391, 392. The legislative history of this amendment shows that Congress intended to allow the Secretary to designate only State officials to employ the caretakers. The Senate committee report makes this intention clear (S. Rep. No. 635, 74th Cong., 1st Sess. (1935), pp. 2–3) (emphasis added):

> Section 6 of S. 2710 will authorize the pooling of National Guard caretakers. Under present law *States* are required to select the caretakers from the units that have the material. Section 6 will permit the handling under the adjutant general or other proper *State official* of the caretakers as a pool. * * *

Nothing in the history of the amendment supports the inference (erroneously drawn by the Tenth Circuit in *United States* v. *Holly*, 192 F. 2d 221) that the Secretary was thereby empowered to choose caretakers himself or to designate a federal official to engage in the selection of caretakers. And the practice has consistently been for the appropriate Secretary to designate the adjutant general or some other State official to perform this function. *E.g.*, NGR 79, dated January 4, 1936, par. 1.

(3) *Administrative practice and interpretation.*—The actual facts involving the exercise of the authority granted by 32 U.S.C. 709 to engage full-time civilian employees demonstrate that these employees are, for all practical purposes, under the control and

supervision of the State. It should first be noted that the full-time civilian employees of the Air National Guard constitute almost one-fifth of its total personnel, and that they are utilized for the day-to-day "administration, supply, operations, training and maintenance" of the Guard. ANGR 40–01, par. 2a; NGR 51, par. 4b; R. 293. The caretakers are characterized as the "key personnel" of the Guard, and they have been authoritatively described as its "backbone." [16] They are on duty in their civilian capacity for a 40-hour work week, whereas the military members of the Guard meet only for 8 or 16 hours a month, and for a fifteen-day summer training period.[17] Consequently, caretakers are the only active personnel of the Guard for the greater part of every year.

The National Defense Act was intended to allow "the State to retain control" of the Guard organization. 53 Cong. Rec. 4356. Later Congressional enactments were designed to maintain that relationship. *E.g.*, S. Rep. No. 1795, 82d Cong., 2d Sess., p. 11.[18] If civilian employees of the Guard are to be considered

[16] Hearings before the Subcommittee of the House Appropriations Committee, 84th Cong., 2d Sess., (1957) vol. 4, p. 1303.

[17] Sec. 92, 32 U.S.C. 502. Most Air National Guard units meet for two days a month. The Maryland 104th Fighter Squadron, for example, met on alternate Saturdays (R. 695).

[18] The retention of State control over some of the nation's armed forces has been one of the principal considerations in favor of retaining the Guard in its present form, rather than federalizing it. See Proceedings of 1944 Governors' Conference, 91 Cong. Rec. App. 1006–1008; see also State memorials against federalizing the National Guard. 95 Cong. Rec. 1323, 1764, 2215, 2976–2977, 3434–3435, 4906, 5015, 5090, 5288, 7215, 7468–7469, 7565–7566; cf. 95 Cong. Rec. 7209–7211.

employees of the federal government, as petitioners contend, the federal government would be in control of the Guard of every State for much the greater portion of every year. Such a reading of Section 90 of the National Defense Act would be inconsistent with the dominant Congressional intent underlying that Act.

The Congressional desire to retain civilian Guard personnel as State employees is also demonstrated by the fact that caretakers are deemed to be State employees for Social Security purposes [19] and for purposes of the payroll deductions for State retirement funds,[20] and for purposes of the laws administered by the Civil Service Commission.[21] Because they are not within the federal civil service, they are ineligible to receive the disability, death and retirement benefits provided by the Civil Service Retirement System.[22]

[19] 42 U.S.C. 418(b)(5); H. Rep. No. 1698, 83d Cong., 2d Sess., p. 50; S. Rep. No. 1987, 83d Cong, 2d Sess., pp. 45–46.

[20] 5 U.S.C. 84d; S. Rep. No. 2045, 84th Cong., 2d Sess., p. 1; see also 5 U.S.C. (Supp. IV) 84d and 32 U.S.C. (Supp. IV) 709(f) (concerning federal contribution to State retirement funds); H. Rep. No. 786, S. Rep. No. 709, 87th Cong., 1st Sess.

[21] *Anselmo* v. *Ailes*, 235 F. Supp. 203 (E.D.N.Y.), pending on appeal as C.A. 2, No. 29428. Like other State employees receiving pay in whole or in part from federal funds, however, the Hatch Act does apply to them. 5 U.S.C. 118k, NGR 51, par. 8.

[22] To be sure, the Bureau of Employees' Compensation awards such employees benefits under the Federal Employees' Compensation Act. However, the concept of employment under workmen's compensation acts and other remedial legislation is much broader than the relationship which imposes vicarious liability under common-law agency principles. *NLRB* v. *Hearst Publications*, 322 U.S. 111, 120–122; *Cardillo* v. *Liberty Mutual Ins. Co.*, 330 U.S. 469, 481; *O'Leary* v. *Brown-Pacific-Maxon*, 340 U.S. 504, 506–507. For similar reasons, *Layne* v. *United States*,

Nor do the civilian employees of the Guard constitute a clearly separable group of employees which may appropriately be assumed to be subject to some control other than that of the State. Civilian personnel of the Guard receiving pay from federal funds are, with a few minor exceptions, selected from members and officers of the Guard to perform the same functions that they would perform in their military capacity. ANGR 40–01, ¶ 2b; NGR 51, ¶ 5b; R. 296. The federal government sets standards of federal recognition for both military and civilian employees which the Guard units and personnel must meet in order to receive federal support, but the only federal sanction for failure to meet those standards is the withdrawal of federal support for the unit. R. 284, 289–290; 32 U.S.C. 108, 301, 305–307, 323. *State* v. *Industrial Commission*, 186 Wis. 1, 6, 202 N.W. 191, 193. Unless and until the unit is called into federal service, State officials operating under the State adjutants general have the exclusive right to command and control the Guardsmen, both in their military and civilian capacities (R. 312–317; see pp. 19–21, 26, 27, *supra*). In each capacity, the adjutant general and other State officials acting under the supervision and direction of the governor, select from among qualified candidates the person to be enlisted and employed, and they have the exclusive right to supervise and direct

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295 F. 2d 433 (C.A. 7), certiorari denied, 368 U.S. 990, is not in point. Indeed, federal compensation under the Act is awarded to Guardsmen training in summer camp in their military capacity (*In the Matter of Eleanore H. Barr, claiming as widow of 1st Lt. Robert A. Barr, deceased National Guardsman*, 10 ECAB 206), in circumstances where the United States would clearly not be held liable for their conduct under the Tort Claims Act.

activities, and to promote, demote, or discharge the men. R. 295; ANGR 40-01, ¶ 3; NGR 51, ¶ 3. In neither capacity does any federal officer or official have authority to give them orders, to control or supervise or assign their daily work, or to promote or discharge them (R. 295-296).

(4) *Other legislative considerations.*—Those charged with the administration of the caretaker program have, from the time of its enactment, consistently considered civilian personnel of the Guard to be employees of the States, and not employees of the United States. 27 Comp. Dec. 344, 345 (October 12, 1920); 21 Comp. Gen. 305 (1941). This consistent administrative interpretation has been communicated to Congress in various forms, including testimony before appropriations committees. For example, in 1957, the ranking air officer in the National Guard Bureau, General Wilson, described the air technician program as follows (Hearings before the Subcommittee of the House Appropriations Committee, 84th Cong., 2d Sess. (1957), vol. 4, p. 1303):

> Our full-time employees which we call air technicians are the backbone of our organization. They serve in a dual capacity; as military members of the Air National Guard and as civilian employees of their respective States.
> * * *

Similarly, in regard to a proposed air technician program for the United States Air Force Reserve, one general testified that it would be "practically a duplication of the Air National Guard's air technician plan" except for "the basic difference" that "the Air National Guard technician is a State employee; but in the Reserve, inasmuch as this is a Federal job, he

would be a civil service employee." *Id.* at pp. 998–999.

Statutes have been passed on the basis of this administrative understanding. In 1954, for example, the Social Security Act was amended so as to provide a separate coverage group for "civilian employees of National Guard units of a State who are employed pursuant to section 90," and to state that for such purpose such employees shall "be deemed to be employees of the State." Act of September 1, 1954, 68 Stat. 1059, amending 42 U.S.C. 418(b)(5). That amendment was expressly based upon the consistent administrative interpretation that civilian personnel of the Guard are employees of the States; both committee reports noted that "[t]he Department of Defense does not regard these employees as Federal employees." H. Rep. No. 1698, 83d Cong., 2d Sess. (1954), p. 50; S. Rep. No. 1987, 83d Cong., 2d Sess. (1954), pp. 45–46.

Perhaps even more indicative of the Congressional understanding is the legislative history of a 1956 statute which authorized federal disbursing officers to make payroll deductions for such employees for State retirement programs. Act of June 15, 1956, 70 Stat. 283, 5 U.S.C. 84d. Although decisions of two courts of appeals holding that such employees were employees of the federal government for purposes of the Tort Claims Act were called to its attention, as well as the probability that that issue might some day be resolved by this Court, Congress adopted the legislation because "[t]hese employees, although paid from Federal funds, are considered to be State rather than Federal employees." S. Rep.

No. 2045, 84th Cong., 2d Sess. (1956), pp. 1, 4–5. See also Pub. L. 86–740, 32 U.S.C. (Supp. II) 715; Pub. L. 87–224, Sept. 13, 1961, 75 Stat. 496, 5 U.S.C. (Supp. IV) 84d and 32 U.S.C. (Supp. IV) 709(f) (concerning contribution to State retirement funds); H. Rep. No. 786, S. Rep. No. 709, 87th Cong., 1st Sess.

In 1960 Congress adhered to its consistent policy of treating the civilian, as well as military, members of the Guard, as employees of the States. It did so in the very context of the Federal Tort Claims Act. For the bill which it rejected (see pp. 24–25, *supra*) would have extended the coverage of that Act to make the United States responsible for the conduct of civilian, as well as military, personnel of the Guard.[23] In adopting instead the recommendation of the Department of the Army that the federal government meet its moral obligations for the conduct of all Guard personnel, Congress enacted legislation providing a comprehensive administrative and legislative remedy. In effect, the amendment authorized the Secretary of the Air Force or Army to pay claims based upon the conduct of military or civilian personnel of the Guard up to an amount of $5,000, and to certify claims in excess of that amount to Congress for payment. Pub. L. 86–740, 32 U.S.C. (Supp. II) 715(a), 715(d), pp. 69–70, *infra*).

The legislative history of the bill makes it clear that Congress deliberately chose to make the new amendment applicable to "civilian employees of the National Guard." H. Rep. No. 1928, 86th Cong., 2d Sess.

[23] Hearings before Subcommittee No. 2 of the House Committee on the Judiciary on H.R. 5435 and 9315, 86th Cong., 2d Sess., p. 12.

(1960), p. 4. And the Congressional reasoning—that liability under the Tort Claims Act would be inappropriate because "the National Guard is primarily under State control, as opposed to Federal control * * * " (S. Rep. No. 1502, 86th Cong., 2d Sess., p. 4; H. Rep. No. 1928, *supra,* p. 4) [24]—applies alike to all Guardsmen, whatever their capacity.

Petitioners rely—as did the Court of Appeals for the District of Columbia Circuit—upon a statement made by the then Deputy Attorney General, in connection with this legislation (Pet. Br. 48–49). A letter of the Deputy Attorney General as well as the oral testimony of a Department of Justice official stated that any legislation would be "unnecessary" with respect to civilian employees because of the "unbroken series of court decisions" holding the United States liable for torts committed by civilian National Guard employees. S. Rep. No. 1502, 86th Cong., 2d Sess. (1960), p. 11; Hearings before Subcommittee No. 2 of the House Committee on the Judiciary on H.R. 5435 and 9315, 86th Cong., 2d Sess. (1960), p. 7. But the committees also had before them a recommendation from the Secretary of the Army which stated that the cases holding the United States liable for the negligence of National Guard caretakers were "at apparent variance

[24] The Congressional determination that the States, rather than the federal government, had control over the National Guard not in active federal service was made despite vigorous efforts of the sponsors of the original bill to show that there was sufficient federal control to warrant the imposition of tort liability upon the United States. Hearings before Subcommittee No. 2 of the House Committee on the Judiciary on H.R. 5435 and 9315, 86th Cong., 2d Sess. (1960), pp. 11–20.

with the long-held views of the Comptroller General of the United States * * * that such National Guard civilian employees * * * are State rather than Federal employees," and that "[t]he Supreme Court of the United States has not considered the question" so that "[t]here is * * * uncertainty as to the status of such employees with respect to coverage by [the Federal Tort Claims Act]." S. Rep. No. 1502, 86th Cong., 2d Sess. (1960), p. 6; H. Rep. No. 1928, 86th Cong., 2d Sess. (1960), p. 6; Hearings before Subcommittee No. 2 of the House Committee on the Judiciary on H.R. 5435 and 9315, 86th Cong., 2d Sess. (1960), p. 54. The committee reports demonstrate that the resulting legislation was based on the recommendations of the Department of the Army. S. Rep. No. 1502, *supra*, p. 2; H. Rep. No. 1928, *supra*, p. 2. Hence it cannot be said that in enacting the 1960 legislation Congress presumed that the decisions permitting recovery against the United States for the negligence of caretakers were correct. Had Congress agreed with the *Holly* cases that negligence of civilian personnel of the National Guard was covered by the Federal Tort Claims Act, it would not have found it necessary to provide an administrative remedy for claims based on such negligence—a remedy supplied by the 1960 legislation. In according the same treatment to military and civilian personnel, upon the reasoning that the Guard was under State, rather than federal, control, Congress apparently did not accept the *Holly* line of decisions.

In providing that meritorious claims in excess of $5,000, based upon the conduct of Guard personnel,

be certified to it for its consideration (32 U.S.C. Supp. II) 715(d), p. 70, *infra*), Congress has demonstrated its preference for handling such matters through a process akin to the enactment of private bills. It took this step despite the fact that a major purpose of the Federal Tort Claims Act has been to reduce the burden caused by the introduction of private bills.[25] Congress concluded, in short, that claims founded upon the conduct of Guard personnel presented a special problem.

The issue presented by this case—whether the United States has assumed responsibility under the Tort Claims Act for the conduct of National Guard personnel, or has assumed it through some non-judicial remedy—is, of course, a question of policy to be determined by Congress. See *United States* v. *Gilman*, 347 U.S. 507, 511–513. In our view, the enactment of 32 U.S.C. (Supp. II) 715 shows that Congress decided to meet the moral obligations created by the federal government's relationship to the National Guard through non-judicial remedies.

C. THERE IS NO RATIONAL DISTINCTION, FOR TORT CLAIMS ACT PURPOSES, BETWEEN MILITARY AND CIVILIAN PERSONNEL OF THE GUARD

As we have demonstrated at pp. 15–25, *supra*, military personnel of the Guard have always been characterized by the courts as State employees for purposes of vicarious tort liability. This characterization is supported by the actual facts regarding the

[25] *Feres* v. *United States*, 340 U.S. 135, 140. See also *Dalehite* v. *United States*, 346 U.S. 15, 24–25; *Indian Towing Co.* v. *United States*, 350 U.S. 61, 68.

direction and control of National Guard members, by the language and purpose of the National Defense Act of 1916 and its subsequent amendments, and by Congressional approval of the rule that such personnel are not employees of the United States. The very same considerations apply with equal vigor to civilian employees of the National Guard. There is no material distinction, so far as Tort Claims Act liability is concerned, between military and civilian Guard personnel.

(1) *State supervision and control.*—Civilian employees of the Guard are, as we have shown (pp. 27–28, 31–35, *supra*), employed, supervised and discharged by officials responsible to the adjutants general of the States or by the adjutants general themselves, who are, in turn, responsible solely to the State governors. They are answerable to no different authority than are military personnel of the Guard. The power granted to the Secretaries of the Army and the Air Force to "designate the person to employ" caretakers is nothing more than a limited authority to select from among State officials to act in that capacity. See pp. 30–31, *supra;* S. Rep. No. 635, 74th Cong., 1st Sess. (1935), pp. 2–3. And the fact that caretakers are paid from federal funds certainly does not distinguish them from military Guardsmen whose compensation comes from the same source. The actual facts regarding direction and control of caretakers fully supports the conclusions reached by the dissenting judge in *Courtney* v. *United States,* 230 F. 2d 112, 115 (C.A. 2):

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> [E]xamination of the Defense Act itself reveals that the special authority of the Secretary of the Army with respect to caretakers extends only to the power to fix their salaries and designate by whom they are to be employed. 32 U.S.C.A. § 42. Apart from these powers he has no greater control over caretakers than over enlisted men and officers of the National Guard. With respect to all members of the federally recognized National Guard the Secretary has wide powers to prescribe regulations, but these are merely pursuant to the federal government's power to attach conditions to the use of federal funds; they do not indicate that members of the Guard have come under such control of the federal government as to be its servants. The Secretary of the Army himself would have no authority to issue an order directly to an officer or member of the Guard nor to the caretaker involved here. He may merely prescribe regulations to which the States must adhere if they wish to continue to receive federal funds for the employment of such caretakers.[26] * * *

In short, the relationship between the federal government and Guard caretakers employed under 32 U.S.C. 709 is similar to the relationship between the government and military personnel of the Guard, and both are analogous to employees of independent contractors who do work for the government. The au-

[26] Indeed, even this description errs in favor of federal control. While the amount of federal funds payable to certain Guard personnel under 32 U.S.C. 709 is fixed by the Secretary, State officials have the authority "to fix" the actual "salaries" paid to such employees, and do in fact fix that sum in amounts different from the amount of federal funds authorized. ANGR 40–01, par. 3b; NGR 51, par. 3a; R. 293–294.

thority to prescribe conditions and minimum standards is entirely different from the authority to supervise and control.

(2) *The language and purpose of the statute.*— Nothing in Section 90 of the National Defense Act of 1916 or in its subsequent amendments supports the distinction between military and civilian Guard personnel which the courts have drawn. The caretaker provision was adopted not to create positions for the execution of federal functions but to authorize payment from federal funds for the administration of State duties, just as the federal payment of military personnel was a means of subsidizing the State-controlled militia. Although title to the equipment and supplies which was to be administered by caretakers remained in the United States, the statute contemplated the States' assumption of responsibility for its maintenance and care. See Sections 82–89 of the National Defense Act of 1916, 39 Stat. 203–205, 32 U.S.C. 105(a)(1), 702(a)(d), 710(c). This appears clearly from the original legislation which empowered the States' unit "commanders" to select the caretakers from among the enlisted men in their unit. In addition, the legislative history indicates that Congress intended that the caretakers would carry out functions which could only be performed constitutionally by the States, such as the "supervision" or "training" of Guard members. H. Rep. No. 1031, 69th Cong., 1st Sess. (1926), p. 3; S. Rep. No. 785, 69th Cong., 1st Sess. (1926), p. 1. Hence there is no implication in the language or purpose of the caretaker provision that those employed under the authority of that statute

would be employees of the United States for any purpose whatever.

(3) *Subsequent Congressional action.*—Congress has never indicated that it considered civilian Guardsmen to be anything other than State employees, just as it has for military Guard personnel. In enacting 32 U.S.C. 715 in 1960, it provided an administrative remedy for tort claims against the United States attributable to the negligence of military or civilian personnel of the Guard; it did not distinguish between caretakers and other Guardsmen, although the cases drawing a distinction were called to its attention. For other purposes as well, as we have demonstrated (pp. 35–40, *supra*), Congress has grouped caretakers with military personnel and considered both to be State employees.

(4) *The court decisions.*—Having no basis at all in the actual administration of the technician program or in the prior or subsequent legislative consideration of the caretaker provision, the dichotomy between military and civilian Guard personnel is traceable entirely to a single decision of the Court of Appeals for the Tenth Circuit—*United States* v. *Holly*, 192 F. 2d 221—which, proceeding from erroneous assumptions, held that civilian personnel were meant to be different from military Guardsmen and that they were employees of the United States. The *Holly* case has been followed in four other circuits.[27] We believe

[27] *Elmo* v. *United States*, 197 F. 2d 230 (C.A. 5); *United States* v. *Duncan*, 197 F. 2d 233 (C.A. 5); *Courtney* v. *United States*, 230 F. 2d 112 (C.A. 2); *United States* v. *Wendt*, 242 F. 2d 854 (C.A. 9); *United States* v. *State of Maryland*, *for*

that *Holly* is wrong, and that the cases which followed it did so entirely on the authority of that decision, without any independent evaluation of the governing statute or the relationship of the federal government to these employees.

The basic mistaken premise of the *Holly* decision was its assumption that "[t]hrough the State Adjutant General, the Secretary of the Army and the Chief of the National Guard Bureau have complete control over the work of the caretaker, including his employment and discharge." 192 F. 2d at 223. The same erroneous assertion was made by the District of Columbia Circuit in its opinion in the *Meyer* case (322 F. 2d at 1013): "The functions lodged by the United States in the State Adjutant General did not serve to supplant this right of control in the United States, though it may be said to have been ancillary thereto." As we have demonstrated at pp. 20–21, *supra*, the adjutants general of the States are not responsible to the Secretaries of the Army or of the Air Force; their sole responsibility is to the governor or other executive official of the State. Hence the supervision exercised by the adjutant general is exclusively State supervision.

The court in *Meyer, supra*, also relied upon its belief that, because a civilian employee of the Guard is "paid by" the United States, "the ultimate right of control over him" is in the United States (322 F. 2d at 1013). But that argument goes too far. For the

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the Use of Meyer, 322 F. 2d 1009 (C.A.D.C.), pending no motion for leave to file petition for rehearing of denial of certiorari, No. 543, O.T. 1963.

"ultimate right of control" lodged in the United States by virtue of its paying the bill on specified conditions is no greater in the case of civilian personnel than in the case of Guard personnel in their military capacity, or in a host of other federally subsidized programs administered through the States or through independent contractors. And, as we have shown above, the employees of the States or of independent contractors are not employees of the United States within the meaning of the Tort Claims Act, notwithstanding the right of control "in an ultimate sense" (322 F. 2d at 1013) which always rests in the party who pays the bill.

The Tenth Circuit in *Holly* also apparently believed that the authority to employ caretakers was initially vested in the Secretary of the Army or the Secretary of the Air Force and that it was "delegated" to the adjutants general of the State by regulation. 192 F. 2d at 222.[28] This is simply a mistake of fact. The statute authorized the Secretaries to "designate" the persons to employ the caretakers, and, as we have shown (pp. 30–31, *supra*), this authority was limited to designations of State officials. The federal officials were never granted authority to employ the caretakers or to appoint other federal officers to carry out that function. Lastly, we note that the maintenance and care of federal property assigned to the Guard is not, as the court in *Holly* apparently believed, a federal

[28] This misconception may have been due in part to an unfortunate choice of language in the regulations themselves. See, NGR 75–16, par. 1, Pet. Br., p. A–5. Similar language is used in ANGR 40–01, par. 3b.

function, but is the function and responsibility of the States. 32, U.S.C. 105(a), 702 (a), (d), 710(c).

We submit, in summary, that the *Holly* case was wrongly decided, as were the subsequent decisions relying on *Holly* as authority. Neither *Holly* nor any later decision articulates a rational basis for distinguishing between military and civilian National Guard personnel for Tort Claims Act purposes. Petitioners' brief in this Court suggests no reason for such a distinction, and we believe that none exists.

II

IN ALL EVENTS, THE UNITED STATES IS NOT LIABLE FOR THE PILOT'S NEGLIGENCE BECAUSE HE WAS ACTING IN A MILITARY CAPACITY, UNDER THE DIRECTION AND CONTROL OF THE STATE OF MARYLAND, AT THE TIME OF THE COLLISION

We have argued above that members of the Guard are not federal employees in the sense of the Tort Claims Act, whatever the activity, military or civilian, in which they may be engaged. Even if they could properly be deemed federal employees in some limited or special sense, *e.g.*, because they are ultimately paid out of federal funds, that would not answer the question of the United States' responsibility for torts committed while they were under the actual direction and supervision of State officials. We have adverted in Point I to the considerations which make plain that State officials do control members of the Guard in the performance of their various duties. In addition, it is clear, as a matter of Maryland law, that an employer is liable

for the acts of his servant only on those occasions when he has the right to supervise and direct him. This reenforces the argument that in no meaningful sense was Captain McCoy a federal employee.

Here, we argue additionally that even if it could be said that he was a federal employee at such times as he performed in his civilian capacity, the fact of the matter is that the flight which led to the collision was conducted primarily in his military capacity and was under the exclusive control of State officials and officers of the Maryland Guard. Hence, under the Maryland law of *respondeat superior,* which controls this aspect of the case,[29] the United States is not liable.

A. UNDER THE APPLICABLE LAW, ONLY THE EMPLOYER HAVING THE RIGHT TO CONTROL THE PILOT'S FLIGHT MAY BE HELD LIABLE

The law of Maryland, like the law of most other States, imposes vicarious tort liability on an employer only if he has the right to supervise his employee in the very activity which gives rise to the accident. *E.g., Henkelmann* v. *Metropolitan Life Insurance Co.,* 180 Md. 591, 26 A. 2d 418; *Gallagher's Estate* v. *Battle,* 209 Md. 592, 122 A. 2d 93, certiorari denied, 352 U.S. 894; *Keitz* v. *National Paving & Contracting Co.,* 214 Md. 479, 491, 134 A. 2d 296; *Restatement, Agency 2d,* § 220, comment d; *id.* § 227. This rule is based upon the unfairness of imposing liability upon one person for the activities of someone over whom he has no control. *Henkelmann* v. *Metropolitan Life Ins. Co., supra,* 180 Md. at 598–599. Consequently, if an employee is loaned by his regular employer

[29] See *Williams* v. *United States,* 350 U.S. 857; *Fries* v. *United States,* 170 F. 2d 726 (C.A. 6), certiorari denied, 336 U.S. 954; *Callaway* v. *Garber,* 289 F. 2d 171 (C.A. 9).

to another employer, and the latter has the exclusive right to supervise and direct the employee's activities, the regular employer is not responsible for the injuries arising out of such activities. *Bauer* v. *Calic*, 166 Md. 387, 401, 171 Atl. 713; *Salowitch* v. *Kres*, 147 Md. 23, 127 Atl. 643. Similarly, if an employee is shared by two employers who agree that control of the employee is to alternate between them, the employee "is the servant only of the one for whom he is acting at the moment." *Restatement, Agency 2d*, § 226, comment b, illustration 5.[30]

Assuming, for purposes of the present argument, that Captain McCoy was an employee of the United States when he was engaged in caretaker duties, he was also—under the consistent line of decisions previously discussed (pp. 15–25, *supra*)—an employee of the State of Maryland while engaged in a military capacity. Hence he was a "shared servant," with the United States and Maryland alternating as employer. Or he might equally be treated as a servant of the federal government for the greater portion of each week (while executing his full-time duties as a civilian employee hired under 32 U.S.C. 709), but on loan to the State of Maryland whenever needed for military duties. In either event, the determinative fact in imposing liability under the doctrine of *respondeat superior* would be whether the federal government or the State had the right

[30] If both employers retain concurrent authority to control the activities of the employee and the manner of their performance, liability may be imposed on both employers for the same conduct. *Keitz* v. *National Paving & Contracting Co.*, 214 Md. 479, 134 A. 2d 296; see *Restatement, Agency 2d*, § 226, comment b, illustration 4.

to control and direct the particular activity which gave rise to the accident.

The decision in *Fries* v. *United States,* 170 F. 2d 726 (C.A. 6), certiorari denied, 336 U.S. 954, illustrates this principle. In that case, an employee of the Public Health Service of the United States was loaned to a health project, which was to be carried out under the direction and supervision of a local health officer. It was conceded that the employee was generally in the employ of the United States within the meaning of the Tort Claims Act and that federal funds had been utilized in carrying out the project. The court held, however, that because he was under the exclusive direction and supervision of the local official, he was on loan to the local government. Accordingly, under the applicable Kentucky law, the United States was not liable for his negligent conduct.[31]

Also in point is the recent decision in *Pattno* v. *United States,* 311 F. 2d 604 (C.A. 10), certiorari denied, 373 U.S. 911. In that case, the plaintiff sought to impose liability for a mid-air collision upon the United States for the asserted negligent acts of two pilots of jet fighter airplanes owned by the United States but assigned to the Wyoming Air National Guard. One of the pilots, in addition to being an offi-

[31] The relevant *respondeat superior* law of Maryland is the same as the law of Kentucky. Both condition the imposition of vicarious tort liability on a right to control the very activity giving rise to the injury. See *Henkelmann* v. *Metropolitan Life Insurance Co.,* 180 Md. 591, 601, 26 A. 2d 418, 423, relying upon *Leachman* v. *Belknap Hardware & Mfg. Co.,* 260 Ky. 123, 84 S.W. 2d 46.

cer in the Guard, was a full-time civilian air technician employed in that capacity as a flying training instructor.[32] 311 F. 2d at 606; P.R. 32.[33] At the time of the accident he was engaged in a training flight, was receiving pay as a civilian employee (311 F. 2d at 605), and was performing the function for which he had been employed in a civilian capacity—flying training (P.R. 60–61).

While holding that a civilian employee of the Guard receiving pay pursuant to 32 U.S.C. 709 is a federal employee,[34] the court refused to impose liability upon the United States. It said that the pilot was performing the flight under the exclusive control and command of the State and was carrying on the business of the State. Hence, under the *respondeat superior* principles of the law of Wyoming, the State was the only employer which could be held vicariously liable for the pilot's negligence.

The only decision to the contrary is *United States* v. *State of Maryland for the Use of Meyer*, 322 F. 2d 1009 (C.A. D.C.), certiorari denied, 375 U.S. 954, pending on motion for leave to file petition for rehearing, No. 543, O.T. 1963, which is the companion decision to this case and arose out of the same collision. The District of Columbia Circuit

[32] The other pilot was an officer of the Guard, and not a civilian employee. In accord with the consistent holdings cited at pp. 15–16, *supra*, the court held that he was an employee of the State and not of the United States. 311 F. 2d at 605–606.

[33] "P.R." references are to the printed record in *Pattno*, a copy of which has been made available to counsel for petitioner in this case.

[34] We disagree with that holding for reasons stated at pp. 15–47, *supra*.

based the imposition of liability on the United States in that case on the misapprehension that "in an ultimate sense the right of control was in the Federal Government at the time and in the circumstances of this accident." 322 F. 2d at 1013. It stated, in that connection, that the United States' control over National Guard employees is analogous to the direction which a plant owner has over his employees through his foreman. *Ibid.* Actually, however, the regulation imposed by the United States over the activities of Guard units is similar to the type of control exercised by a party over the conduct of the employees of an independent contractor. The State officials—be they the governor or the adjutant general—are like the executive officers of an independent contractor which has been given certain specifications to meet but retains ultimate control over the supervision and direction of its employees, as well as over their hire and discharge and their working conditions. See pp. 22–24, *supra;* R. 294–295. Since, as we shall show, no federal official had the right to direct Captain McCoy's superiors "in the performance of his work and the manner in which the work is to be done" (*Keitz* v. *National Paving & Contracting Co.*, 214 Md. 479, 491, 134 A. 2d 296) with respect to the flight which resulted in the collision, the United States did not have any "ultimate right of control."

B. THE FLIGHT WAS CONDUCTED PRIMARILY IN THE PILOT'S MILITARY CAPACITY AND IT WAS SUBJECT TO THE EXCLUSIVE CONTROL OF STATE OFFICIALS

Captain McCoy, who sought permission to make the flight in question, and Lieutenant Colonel Kilkowski,

his commanding officer, who authorized and directed it, intended and understood that it was "a proficiency flight" (R. 108, 150–151). That understanding was confirmed by the flight order, which was signed by order of the commander of the 104th Squadron (R. 209), and by the flight clearance, which revealed that the purpose of the flight was "general training, operational training" (R. 207, 595–596). The district court so recognized, and found that a purpose of the flight was to maintain proficiency (R. 695, 697). The uncontroverted testimony is that "proficiency" is military terminology for "training," and a proficiency flight is the same as a training flight (R. 161–162). Accordingly, the findings of the district court themselves establish that the flight in question was a training flight.

It is equally clear (and is apparently conceded by petitioners) that when an officer pilot of the Guard who is also a civilian air technician flies an airplane on a training mission, he does so primarily in his military capacity.[35] Only officers of the Air National Guard and other military personnel are authorized to fly their airplanes, and these may fly only on valid military orders (R. 304, 697). Indeed, the only reason Captain McCoy was paid in a civilian rather than military capacity for the flight in question was that he had already flown the maximum number

[35] Captain McCoy, Col. Kilkowski, and a ranking officer of the Air National Guard all so understood and testified. See p. 5, *supra*. Captain McCoy's testimony is typical (R. 117–118): "I would not be on a flight in duty as a maintenance chief. I would be on the flight in my duty as a captain in the Air National Guard * * *. It is my belief that as an air technician, when I get in an airplane I become a Captain in the Air National Guard * * *."

of hours for which military pay was available (R. 697; see R. 153–154).

The order authorizing the flight in question and directing the route and time of departure and return was signed by order of the commander of the 104th Squadron, who was an officer of the Maryland Air National Guard and whose authority was derived from the Governor of Maryland through the adjutant general (R. 209, 293–295). No federal officer or employee was empowered to authorize or direct the flight, prescribe its route or time of departure, or otherwise control or supervise Captain McCoy's piloting of the airplane.

While the flight in question had no specific maintenance function or purpose, it is true that Captain McCoy, in his civilian capacity as air technician, observed the performance of the aircraft and its equipment, as well as other mechanical aspects of the flight. This, as his commanding officer stated, was "a secondary portion of any flight" (R. 163–164, 696–697). This "secondary" feature was related to his position as a civilian employee of the Guard. The district court (and the court of appeals in the *Meyer* cases) relied upon this dual aspect in imposing liability upon the United States. 322 F. 2d 1009; R. 697, 699.

This circumstance does not, however, suffice to render the United States liable for the pilot's negligence. For both the training and the maintenance aspects of the flight were the responsibility and business of the State. 32 U.S.C. 501(b), 105(a), 702 (a); (d), 710(e). And, as we have shown, the critical question

under Maryland law (as under the law of most States) is whether the employer on whom liability is sought to be imposed has the right to direct and control the performance of the task which gave rise to the injury.[36] Only State officials, acting in their capacity as officers of the Maryland National Guard, had the authority to tell Captain McCoy when, where and how to fly the airplane (R. 304). Moreover, the primary and official purpose of the flight was as a military training flight—to maintain Captain McCoy's proficiency. As Judge Hastie observed below, the fact that Captain McCoy might put to use in his civilian maintenance capacity the information he obtained on the flight "did not change the basic character of this training flight" (R. 725.)[37]

[36] Petitioners' contention that the Maryland presumption of agency arising out of the ownership of the airplane imposes liability upon the United States (Pet. Br. 51–52) is wholly untenable. In the first place the presumption was rebutted by the conceded fact that the airplane in question here was permanently assigned to the Maryland Air National Guard upon manufacture, more than one and a half years before the accident in question (R. 678). Secondly, the uncontradicted evidence as to the command and control over Captain McCoy would, under any circumstances, rebut the presumption.

[37] Petitioners' reliance upon the certification by Col. Ebaugh to the Bureau of Employee Compensation of the Department of Labor that Captain McCoy was working as a civil employee of the United States and not as a member of the Maryland National Guard. The court of appeals properly ruled that this admission was not binding or conclusive (R. 724). Moreover, Col. Ebaugh conceded that he had no personal knowledge of the facts concerning the flight in question (R. 243). Regardless of the admissibility of the certification, therefore, it clearly had no probative weight in face of the uncontradicted testimony of persons who did have personal knowledge of the facts in question.

III

THE DOCTRINE OF COLLATERAL ESTOPPEL IS INAPPLICABLE IN THE CIRCUMSTANCES OF THIS CASE

In their brief on the merits in this Court, petitioners assert that, under the doctrine of collateral estoppel, the judgment in the *Meyer* cases determined all the material issues in this case and required that judgment be entered for petitioners (Pet. Br. 59–60). In this claim, petitioners are supported by the *amici*, who are the plaintiffs in the *Meyer* cases. Brief of *Amici Curiae*, pp. 17–21. This newly asserted claim is insubstantial both because it is untimely and because it is based on erroneous premises regarding the law of collateral estoppel.

A. THE COLLATERAL ESTOPPEL CLAIM COMES TOO LATE

A claim of estoppel by judgment, like the assertion of res judicata or the defenses of release or statute of limitations, is not jurisdictional and must be asserted at the appropriate time in order to be heard. Rules 8(c), 12(a) and 12(h), Federal Rules of Civil Procedure. The final district court judgment in the *Meyer* cases preceded the judgments in this case by several days, and the decision of the District of Columbia Circuit was issued nine months before the Third Circuit's decision in this case. Petitioners did not, however, assert that they were entitled to judgment because of the collateral estoppel effect of the *Meyer* judgments in either the district court or in the court of appeals until after the decision of the court of appeals. Indeed, in requesting permission to proceed on the basis of the record printed in

the *Meyer* cases, petitioners expressly disavowed any such claim. They said, in a motion filed with the Third Circuit, that they "do not concede that the decision in the other cases are res judicata here." [38]

Moreover, although the petition for a writ of certiorari alluded to the doctrine of collateral estoppel, the two questions presented for review were not at all related to its application to the facts of this case (Petition, p. 3). The failure to raise the question in the court of appeals in a timely manner and squarely to present it to this Court bars petitioners from asserting it at this late hour. See *California* v. *Taylor*, 353 U.S. 553, 556, n. 2; *Lawn* v. *United States*, 355 U.S. 339, 362, n. 16; Rule 23(1)(c) of the Revised Rules of this Court.

B. THE COLLATERAL ESTOPPEL CLAIM IS UNSOUND ON THE MERITS

Petitioners' contention is that the United States is bound by the judgments in the *Meyer* cases on all issues of fact and law resolved there, notwithstanding the fact that the plaintiffs in those cases are total strangers to the petitioners here. Petitioners acknowledge that a judgment favorable to the United States would not have bound them in this litigation, but they contend that "mutuality" is no longer an essential element for collateral estoppel. Pet. Br. 59–60; Brief of *Amici Curiae*, pp. 18–20.

If petitioners' contention is valid, it would have an obviously unfair effect on defendants in multiple injury accidents. Passengers in a bus involved in a

[38] Appellees' motion for leave to file five photocopies of exhibits, to consolidate the appeals and for a twenty-day extension, in C.A. 3, Nos. 14041–14042 (February 11, 1963), p. 3.

highway accident might, for example, sue the driver of the other vehicle individually. A judgment exonerating the defendant from liability in any one or more actions would not bar a subsequent suit by other passengers. But once the defendant lost any one action, the remaining passengers, according to petitioners, could assert that judgment as binding in their actions under the principles advocated here by petitioners.

There can be little justification for such a novel rule, at least in the broad form suggested by petitioners. The very cases cited by petitioners and the *amici curiae* demonstrate that "the right, question or fact" determined in the first proceeding should "be taken as conclusively established" only "in a subsequent suit *between the same parties or their privies.*" *Southern Pacific Railroad Co.* v. *United States,* 168 U.S. 1, 48–49. (Emphasis added.) See *Partmar Corp.* v. *Paramount Corp.,* 347 U.S. 89, 91, 101–103; *Lawlor* v. *National Screen Service,* 349 U.S. 322; *Cromwell* v. *County of Sac,* 94 U.S. 351, 352. The operation of collateral estoppel is justified only when the policy "that there be an end to litigation" overrides further inquiry into the facts or law; its primary justification is that "matters once tried shall be considered forever settled *as between the parties.*" *Baldwin* v. *Iowa State Traveling Men's Association,* 283 U.S. 522, 525. (Emphasis added.) See *Restatement, Judgments,* § 93(h), comment d.

The cases that have held that lack of mutuality is not a bar to the assertion of estoppel by judgment have, by and large, involved the defensive use of collateral estoppel where the second defendant derived

his alleged liability from the exonerated defendant—*e.g.*, a master being sued after his servant was exonerated or an indemnitor after the indemnitee was found not liable. *E.g., Bernhard* v. *Bank of America*, 19 Cal. 2d 807, 812–814; *Restatement, Judgments*, § 96, 99. The same rule would not apply to permit affirmative use of a judgment by a stranger against a defendant who has once been held liable. *E.g., Nevarov* v. *Caldwell*, 161 Cal. App. 2d 762, 327 P. 2d 111; *Elder* v. *New York Pa. Motor Express Inc.*, 284 N.Y. 350, 31 N.E. 2d 188.[39]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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FEBRUARY 1965.

[39] We have substantial doubts about the validity of the ruling in regard to collateral estoppel in *United Air Lines* v. *Wiener*, 335 F. 2d 379, 404–405 (C.A. 9). But even the decision in that case did not deprive the defendant of its right to appeal on legal questions.

703-326—65——6

APPENDIX

1. The Constitution of the United States provides in pertinent part:

> Art. I, Sec. 8
>
> The Congress shall have Power * * *
>
> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
>
> To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress; * * *
>
> Art. II, Sec. 2
>
> The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; * * *

2. The Federal Tort Claims Act provides in pertinent part (Title 28, United States Code):

> § 1346. United States as defendant.
>
> * * * * * *
>
> (b) Subject to the provisions of chapter 171 of this title, the district courts, * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the

Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

§ 2671. Definitions.

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term—

"Federal agency" includes the executive departments and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

* * * * *

§ 2674. Liability of United States.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * * * *

3. The National Defense Act of 1916 (39 Stat. 166 *et seq.*), as amended, provides in pertinent part (Title 32, United States Code):

a. Section 101. Definitions.

* * * * *

(4) "Army National Guard" means that part of the organized militia of the several States and Territories, Puerto Rico, the Canal Zone, and the District of Columbia, active and inactive, that—

(A) is a land force;

(B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article I, of the Constitution;

(C) is organized, armed, and equipped wholly or partly at Federal expense; and

(D) is federally recognized.

* * * * *

(6) "Air National Guard" means that part of the organized militia of the several States and Territories, Puerto Rico, the Canal Zone, and the District of Columbia, active and inactive, that—

(A) is an air force;

(B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article I of the Constitution;

(C) is organized, armed, and equipped wholly or partly at Federal expense; and

(D) is federally recognized.

* * * * *

Section 105. Inspection.

(a) The Secretary of the Army shall have an inspection made at least once a year by inspectors general, or, if necessary, by any other commissioned officers of the Regular Army detailed for that purpose, to determine whether—

(1) the amount and condition of property held by the Army National Guard are satisfactory;

(2) the Army National Guard is organized as provided in this title;

(3) the members of the Army National

Guard meet prescribed physical and other qualifications;

(4) the Army National Guard and its organization are properly uniformed, armed, and equipped and are being trained and instructed for active duty in the field, or for coast defense; and

(5) Army National Guard records are being kept in accordance with this title.

The Secretary of the Air Force has a similar duty with respect to the Air National Guard.

(b) The reports of inspections under subsection (a) are the basis for determining whether the National Guard is entitled to the issue of military property as authorized under this title and to retain that property; and for determining which organizations and persons constitute units and members of the National Guard.

* * * * *

Section 106. Annual appropriations.

Sums will be appropriated annually, out of any money in the Treasury not otherwise appropriated, for the support of the Army National Guard and the Air National Guard, including the issue of arms, ordnance stores, quartermaster stores, camp equipage, and other military supplies, and for the payment of other expenses authorized by law.

* * * * *

Section 108. Forfeiture of Federal benefits.

If, within a time to be fixed by the President, a State does not comply with or enforce a requirement of, or regulation prescribed under, this title its National Guard is barred, wholly or partly as the President may prescribe, from receiving money or any other aid, benefit, or privilege authorized by law.

Section 109. Maintenance of other troops.

* * * * *

(b) Nothing in this title limits the right of a State or Territory, Puerto Rico, the Virgin Islands, the Canal Zone, or the District of Columbia to use its National Guard or its defense forces authorized by subsection (c) within its borders in time of peace, or prevents it from organizing and maintaining police or constabulary.

(c) In addition to its National Guard, if any, a State or Territory, Puerto Rico, the Virgin Islands, the Canal Zone, or the District of Columbia may, as provided by its laws, organize and maintain defense forces. A defense force established under this section may be used within the jurisdiction concerned, as its chief executive (or commanding general in the case of the District of Columbia) considers necessary, but it may not be called, ordered, or drafted into the armed forces. * * *

* * * * *

Section 314. Adjutants general.

(a) There shall be an adjutant general in each State and Territory, Puerto Rico, the Canal Zone, and the District of Columbia. He shall perform the duties prescribed by the laws of that jurisdiction.

* * * * *

(d) The adjutant general of each State and Territory, Puerto Rico, the Canal Zone, and the District of Columbia, and officers of the National Guard, shall make such returns and reports as the Secretary of the Army or the Secretary of the Air Force may prescribe, and shall make those returns and reports to the Secretary concerned or to any officer designated by him. Each Secretary shall send with his

annual report to Congress an abstract of the returns and reports of the adjutants general and such comments as he considers necessary for the information of Congress.

* * * * *

Section 501. Training generally.

(a) The discipline, including training, of the Army National Guard shall conform to that of the Army. The discipline, including training, of the Air National Guard shall conform to that of the Air Force.

(b) The training of the National Guard shall be conducted by the several States and Territories, Puerto Rico, the Canal Zone, and the District of Columbia in conformity with this title.

* * * * *

Section 702. Issue of supplies.

(a) Under such regulations as the President may prescribe, the Secretary of the Army and the Secretary of the Air Force may buy or manufacture and, upon requisition of the governor of any State or Territory, Puerto Rico, or the Canal Zone, or the commanding general of the National Guard of the District of Columbia, issue to its Army National Guard and Air National Guard, respectively, the supplies necessary to uniform, arm, and equip that Army National Guard or Air National Guard for field duty.

* * * * *

(d) No property may be issued to the National Guard of a State or Territory, Puerto Rico, the Canal Zone, or the District of Columbia, unless that jurisdiction makes provision, satisfactory to the Secretary concerned, for its protection and care.

* * * * *

Section 709. Caretakers and clerks.

(a) Under such regulations as the Secretary of the Army may prescribe, funds allotted by him for the Army National Guard may be

spent for the compensation of competent persons to care for material, armament, and equipment of the Army National Guard. Under such regulations as the Secretary of the Air Force may prescribe, funds allotted by him for the Air National Guard may be spent for the compensation of competent persons to care for material, armament, and equipment of the Air National Guard. A caretaker employed under this subsection may also perform clerical duties incidental to his employment and other duties that do not interfere with the performance of his duties as caretaker.

(b) Enlisted members of the National Guard and civilians may be employed as caretakers under this section. However, if a unit has more than one caretaker, one of them must be an enlisted member. Compensation under this section is in addition to compensation otherwise provided for a member of the National Guard.

(c) Under regulations to be prescribed by the Secretary concerned, material, armament, and equipment of the Army National Guard or Air National Guard of a State or Territory, Puerto Rico, the Canal Zone, or the District of Columbia may be placed in a common pool for care, maintenance, and storage. Not more than 15 caretakers may be employed for each of those pools.

(d) Under regulations to be prescribed by the Secretary concerned, one commissioned officer of the National Guard in a grade below major may be employed for each pool set up under subsection (c) and for each squadron of the Air National Guard. Commissioned officers may not be otherwise employed under this section.

(e) Funds appropriated by Congress for the National Guard are in addition to funds appropriated by the several States and Territories, Puerto Rico, the Canal Zone, and the District of Columbia for the National Guard, and are available for the hire of caretakers and clerks.

(f) The Secretary concerned shall fix the

salaries of clerks and caretakers authorized to be employed under this section, and shall designate the person to employ them.

* * * * *

Section 710. Reports of survey.

(a) All military property issued by the United States to the National Guard remains the property of the United States.

* * * * *

(c) The Secretary concerned or his designated representative may relieve the State or Territory, Puerto Rico, the Canal Zone, or the District of Columbia, whichever is concerned, of further accountability and pecuniary liability for the property. However, if it was lost, damaged, or destroyed through negligence, the money value of the property or the damage thereto shall be charged (1) to the State or Territory, Puerto Rico, the Canal Zone, or the District of Columbia, whichever is concerned, to be paid from its funds or from any non-Federal funds; or (2) to the member to whom the loss, damage, or destruction is charged from pay due him for duties performed in his status as a member of the National Guard.

* * * * *

4. The National Defense Act of 1916 (39 Stat. 166), as amended, provides in pertinent part (Title 10, United States Code):

§ 3079. Army National Guard of United States: status when not in Federal service.

When not on active duty, members of the Army National Guard of the United States shall be administered, armed, equipped, and trained in their status as members of the Army National Guard.

* * * * *

§ 3495. Army National Guard of the United States: status.

Members of the Army National Guard of the United States are not in active Federal service

except when ordered thereto under law.

* * * * * *

§ 8079. Air National Guard of United States: status when not in Federal service.

When not on active duty, members of the Air National Guard of the United States shall be administered, armed, equipped, and trained in their status as members of the Air National Guard.

* * * * * *

§ 8495. Air National Guard of United States: status.

Members of the Air National Guard of the United States are not in active Federal service except when ordered thereto under law.

5. Public Law 86–740, September 13, 1960 (74 Stat. 878) provides in pertinent part (Title 32, United States Code, Supp. II):

§ 715. Property loss; personal injury or death; activities under certain sections of this title.

(a) Under such regulations as the Secretary of the Army or Secretary of the Air Force may prescribe, he or, subject to appeal to him, the Judge Advocate General of the armed force under his jurisdiction, if designated by him, may settle, and pay in an amount not more than $5,000 a claim against the United States for—

(1) damage to, or loss of, real property, including damage or loss incident to use and occupancy;

(2) damage to, or loss of, personal property, including property bailed to the United States or the National Guard and including registered or insured mail damaged, lost, or destroyed by a criminal act while in the possession of the National Guard; or

(3) personal injury or death; either caused by a member of the Army National Guard or the Air National Guard, as the

case may be, while engaged in training or duty under section 316, 502, 503, 504, or 505 of this title or any other provision of law for which he is entitled to pay under section 301 of title 37, or for which he has waived that pay, and acting within the scope of his employment; caused by a person employed under section 709 of this title acting within the scope of his employment; or otherwise incident to noncombat activities of the Army National Guard or the Air National Guard, as the case may be, under one of those sections.

* * * * *

(d) If the Secretary of the military department concerned considers that a claim in excess of $5,000 is meritorious and would otherwise be covered by this section, he may pay the claimant $5,000 and report the excess to Congress for its consideration.

* * * * *

(g) Notwithstanding any other provision of law, the settlement of a claim under this section is final and conclusive.

(h) In this section, "settle" means consider, ascertain, adjust, determine, and dispose of a claim, whether by full or partial allowance or disallowance.

6. The Constitution of the State of Maryland provides in pertinent part (Article II, Section 8):

> The Governor shall be the Commander in Chief of the land and naval forces of the State; and may call out the militia to repel invasions, suppress insurrections, and enforce the execution of the Laws; but shall not take the command in person, without the consent of the Legislature.

7. The Maryland Code Ann., Article 65, provides in pertinent part:

§ 6. Governor to be commander-in-chief.

The Governor of the State, by virtue of his office, shall be the commander-in-chief of the militia of the State, except as of such portions as may at times be in the service of the United States.

The Governor shall have power to make such rules and regulations and issue orders for the enlistment, discharge, organization, discipline, training and equipment of the militia from time to time as may become necessary in order to conform to this article and the National Defense Act, and amendments thereto and regulations made in pursuance thereof.

* * * * *

§ 8. When ordered into service of State.

The Governor shall have the power in case of insurrection, invasion, tumult, riot, breach of peace or imminent danger thereof, or to enforce the laws of this State, to order into service of the State any part of the militia that he may deem proper. * * *

§ 9. Adjutant General; assistant adjutant general; Governor's staff.

The Adjutant General shall be appointed by the Governor by and with the advice and consent of the Senate. * * *

§ 10. Ranking line officer—In general.

The ranking line officer shall be on active duty status and his salary shall be as stated in the annual budget; provided, that should the ranking line officer be also appointed the Adjutant General, he shall receive only the salary provided by law for the ranking line officer; and provided further, that, should the ranking line officer be called or ordered into the active military service of the United States, under the Constitution and laws of the United States, the Governor may designate an acting ranking line officer, who will exercise all the duties of the office during such period.

The ranking line officer shall be in control of the Military Department of the State, and subordinate only to the Governor in matters pertaining to said department. * * *

§ 11. Same—As Quartermaster General.

The ranking line officer, as Quartermaster General, shall be responsible to the Governor for the care, preservation and safekeeping of all military property. He shall prepare returns of all federal military property at the time and in the manner prescribed by the Secretary of War [Secretary of the Army]. * * *

* * * * *

§ 16. Workmen's compensation insurance.

The ranking line officer is authorized and directed to take out and thereafter maintain a policy or policies of insurance with the State Accident Fund or with any stock corporation or mutual association authorized to transact the business of workmen's compensation insurance in this State, to secure compensation under the Workmen's Compensation Law to all officers and enlisted men of the organized militia of the State of Maryland; provided that, whenever and so long as provision equal to or better than that given under the terms of this article is made by the federal government for an officer or enlisted man or employee of the Military Department of Maryland injured in the course of employment, such officer, enlisted man or employee shall not be entitled to the benefits of this section.

The ranking line officer is authorized and directed to pay the necessary premium or premiums for said policy or policies of insurance out of appropriations for the militia to be included in the State budget by the Governor of the State.

* * * * *

§ 20. Same—Appointment and commission.

All officers shall be appointed and commissioned by the Governor * * *.

* * * * *

§ 26. Responsibility of organization commanders; responsibility of officers and enlisted men to commanding officers; inspections.

Organization commanders may cause those under their command to perform any military duty, and shall be responsible to the Governor for the general efficiency of the units of the organized militia under their commands. Commanding officers of units shall be responsible to their immediate commanders for the equipment, drill, instruction, movements and efficiency of their respective commands. All officers and enlisted men shall be responsible to their immediate commanding officers for prompt and unhesitating obedience, proper drill and the preservation and proper use of the property of [the] State and of the United States, or organization, in their possession. * * *

* * * * *

8. The Air National Guard Regulations (ANGR) 40–01 provide in pertinent part:

SECTION I—GENERAL

* * * * *

2. Policy:

a. Air National Guard civilian personnel shall be utilized to effect maximum efficiency in administration, supply, operations, training, and maintenance of the Air National Guard.

b. Air National Guard civilian personnel must be federally recognized members of the Air National Guard of the State, Territory, Puerto Rico, or the District of Columbia except for the employment of—

(1) Females (when specifically authorized by the Chief, National Guard Bureau).

(2) Temporary personnel paid from funds other than those designated for the pay of air technicians.

c. Officers will not be appointed to Air National Guard civilian personnel positions authorized for airmen, nor will airmen be appointed to positions authorized for officers.

* * * * *

i. Air National Guard civilian personnel will occupy the T/O vacancy most comparable to their civilian position.

3. Authority:

a. Basic authority for the employment of Air National Guard civilian personnel is contained in Section 90, National Defense Act, as amended.

b. Authority is delegated to the adjutants general of the several States, Territories, Puerto Rico, and the District of Columbia, to employ, fix rates of pay, establish work hours (a minimum of 40 hours per week), supervise, and discharge employees within the purview of this regulation; subject to the provisions of law and such instructions as may be subsequently issued by the Chief, National Guard Bureau.

4. Status. Air National Guard civilian personnel are considered to be employees of the State, Territory, Puerto Rico, or the District of Columbia (21 Comp. Gen. Dec. 305).

5. Definitions. For the purpose of this Regulation:

a. "Air National Guard civilian personnel" means any and all civilians employed by the several States, Territories, Puerto Rico, and the District of Columbia, permanent or temporary, male or female, supported wholly or in

part by Federal funds appropriated for that purpose, including but not limited to the following:

(1) "Air technician" means a person employed for the performance of the duties of positions listed on the manning guide and paid from funds designated for the pay of air technicians.

* * * * *

6. Qualifications. Air National Guard civilian personnel shall be qualified as follows:

a. Technically qualified to perform the duties of the position for which being employed without further schooling or training at the expense of the government; *and*

b. Physically qualified for active Federal service if the position for which employed requires membership in the Air National Guard.

7. Appointment:

a. *Authority.* Appointment of Air National Guard civilian personnel is a function of the adjutant general.

* * * * * *

SECTION II—FINANCIAL

8. Air National Guard Civilian Man Months and Funds. Man months and funds will normally be authorized and published prior to the beginning of each fiscal year.

a. The number of man months programmed for each State, Territory, Puerto Rico, or the District of Columbia, is basically computed upon the following:

(1) The number of military personnel assigned to each base.

(2) The number and type of aircraft projected for assignment to each base.

(3) Number of positions, per unit, organization or office authorized for each base.

(4) Availability of man months.

b. Funds for temporary personnel programmed are based upon the following:

(1) Availability of funds.

* * * * *

10. Pay and Per Diem:

a. *Salary and Wages.* Federal funds paid to Air National Guard civilian personnel shall not exceed the rates established by the Chief, National Guard Bureau. Any payments in excess of the established rates must be from other than Federal funds. Air National Guard civilian personnel may be paid either semi-monthly or monthly, as directed by the adjutant general. District of Columbia employees may be paid bi-weekly. Payment will be made by the USAF finance officer designated in AFM 173–20, as amended, to pay commercial accounts and civilian pay rolls for the Air National Guard.

* * * * *

SECTION III—BENEFITS

12. Social Security. Air National Guard civilian personnel are eligible to be covered by the provisions of the Social Security Act, as amended, unless such personnel are under an existing retirement system. Employer's contribution may be paid from the same funds used for the pay of the individual.

13. Employees Compensation. Current policy of the Bureau of Employee's Compensation, United States Department of Labor permits compensation to be paid for injuries or death incurred by Air National Guard civilian personnel in the performance of their official duties.

14. Retirement. Air National Guard civilian personnel are not included in the Federal Civil Service Retirement System.

* * * * *

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OCTOBER TERM, 1964

No. 345

STATE OF MARYLAND, for the use of NADINE Y. LEVIN, *et al.*,

Petitioners,

– vs –

UNITED STATES OF AMERICA,

Respondent.

STATE OF MARYLAND, for the use of SYDNEY L. JOHNS, *et al.*,

Petitioners,

– vs –

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF ON BEHALF OF PETITIONERS

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Supreme Court of the United States

OCTOBER TERM, 1964

No. 345

STATE OF MARYLAND, for the use of NADINE Y. LEVIN, *et al.*,

Petitioners,

– VS –

UNITED STATES OF AMERICA,

Respondent.

STATE OF MARYLAND, for the use of SYDNEY L. JOHNS, *et al.*,

Petitioners,

– VS –

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF ON BEHALF OF PETITIONERS

Introduction

In its brief (hereinafter referred to as U.S. Brief) the United States takes the position that McCoy was not an employee of the United States either in his capacity as a civilian technician caretaker of federal property employed under 32 U. S. C. §709(a) or in his capacity as a military

member of the Maryland National Guard. The Government further contends, in the alternative, that if McCoy was an employee of the federal government for some purposes, "he was not subject to any federal direction or control or engaged in any function of the federal government" while making the flight in question (U.S. Brief 10).

The argument by respondent, that civilian caretakers of federal property employed pursuant to an act of Congress, 32 U. S. C. §709(a), are not employees of the United States, has been answered fully in the brief on behalf of petitioners and in the amici curiae brief. So also has the question whether McCoy was acting in the scope of his federal employment.

Respondent rests its argument upon the "militia" clause of the Constitution whereas we are here concerned only with a civilian caretaker as distinguished from a member of the National Guard; respondent argues that the relationship of the National Guard of each state to the federal government is essentially that of "a party and an independent contractor." To begin with, the independent contractor argument is irrelevant for we are dealing with the employment of McCoy by the United States pursuant to a specific federal statute, as its trained technician caretaker of its own costly and complicated military aircraft, and the maintenance of the same pursuant to prescribed U.S. Air Force standards. The "independent contractor" argument also fails against the massive structure of federal statute, regulation and integrated organization of the National Guard as an essential part of our national defense system, all fully discussed in our main brief. To liken each state unit of the National Guard to an independent contractor is to convert our National Guard defense system into fifty independent standing armies.

The petitioners and amici curiae have discussed in detail the evidence showing that McCoy, as the person

in charge of all maintenance of federally owned airplanes allocated to the unit, and in charge of all maintenance personnel of said equipment, was performing his civilian caretaker duties at the time of the occurrence.

Respondent's rather oblique approach to the facts is characterized by its statement on page 3 of its brief:

> "In this Court the United States does not challenge the finding of the district court that McCoy's negligence was responsible for the accident."

The fact of the matter is that McCoy's negligence was not contradicted by the United States in the district courts and that the district courts' findings of McCoy's negligence and of the awards of damages in the wrongful death cases were not disputed nor appealed from by the United States. The unsupported assertions made by respondent and its rather incomplete selections from the record render a detailed reply necessary to assist the court in this important case and to insure that there be no confusion about the facts. Reference is made to, among others, an attempt to support respondent's contention that McCoy was at most a "shared" or "borrowed" servant, that he was only under the direction and control of the State (U. S. Brief 12), and respondent's argument concerning the legislative history of an administrative remedy enacted by Congress in 1960 relative to certain claims, and its claim of waiver of the right to assert collateral estoppel.

I.

Generally as to Respondent's Statement of Facts.

Respondent states, after relating the fact that McCoy was a military member of the Air National Guard of Maryland, that he "was also employed as a civilian air technician * * *" (U. S. Brief 3). Thus stated, it is a matter of the "tail wagging the dog." McCoy was a civilian technician-caretaker of federal property employed under 32 U. S. C. §709(a), as Aircraft Maintenance Chief and also acting Maintenance Supervisor, and these civilian jobs were full-time jobs during which he supervised the maintenance of all the aircraft and the work of 75 to 80 civilian maintenance personnel at the base and was paid $7,500.00 annually by the United States. His military duties to which respondent gives primary emphasis represented only part-time work (R. 41; Dist. Ct. Find. 23, R. 697), consisting of 48 four hour periods annually (R. 127) usually served on two Saturdays a month (R. 38) and 15 days afield training (R. 127, 155), for which he was paid approximately $2,000.00 a year by the United States (R. 43). (His military duties also included a maximum of 36 flight training periods of 4 hours each (R. 127) and McCoy had accomplished this maximum prior to the day of the accident (R. 167)). It is not disputed that the accident occurred on a Tuesday, during McCoy's regular civilian work week, and while he was employed in his civilian capacity, and being carried in his civilian pay status at the base (R. 67, 68, 77, 78; Dist. Ct. Find. 26, R. 697, 698) and not during a flying training period (R. 167).

The respondent states that the air maintenance chief was not required to be a rated pilot on flying status nor "was such a qualification listed as desirable" (U. S. Brief 4). This statement ignores the fact that at the

time of the occurrence McCoy was also acting Maintenance Supervisor and that under ANGM 40-01, p. 106, R. 217, under the heading "Qualifications," it is stated as "desirable" that the maintenance supervisor "be a rated pilot on flying status to enable incumbent to make test flights on assigned aircraft." General Wilson, Head of the National Guard Bureau, on active federal duty in that capacity, testified that an air technician and a base commander should both have a flight rating; that it is desirable for the maintenance officer as well as the base detachment commander to have a flying status; that a maintenance officer should be able to check his own airplanes. That ". . . if I were a squadron commander, I would insist on my maintenance officer being a rated pilot. It gives the pilots, the other pilots, certainly a safe feeling if they know the guy that is doing the maintenance is also going to fly the airplane." (R. 306). General Wilson further testified that to keep that flying rating, which he considered desirable for a maintenance chief, it was necessary for him to fly a given number of hours to maintain proficiency in that type of equipment (R. 308).

In fact, there were occasions when it was absolutely necessary to take the airplanes off the ground because maintenance of the equipment could not be checked in any other way (R. 81). Kilkowski, McCoy's immediate superior in his civilian technician job, was employed in a civilian capacity as Base Detachment Commander (air technician) under the same caretaker state as McCoy (R. 122, 123, 511, 512), and Kilkowski testified it was good business to have the head of the maintenance section (McCoy) in a flying capacity, qualified as a test pilot, and as a general pilot in all capacities (R. 605, 606). McCoy also testified it was desirable to have an aircraft maintenance officer who flew the aircraft because if he gets a better understanding of the quality of the mainte-

nance done under his supervision, he is better able to talk to the pilots, to uncover or discover certain discrepancies, and gets better information as to the condition of the equipment (R. 70, 71). Kilkowski testified that it is desirable for a maintenance officer to be a flying officer because there will be better maintenance, safer aircraft, and as a result, a better unit (R. 164).

McCoy testified that at the time of the accident he was flying in his capacity as a caretaker of government property (R. 80). The purposes of flights made by McCoy were often several fold. Any flight he made as an aircraft maintenance technician was to evalute the condition of equipment (R. 70, 139, 140), and insure proper maintenance of the equipment over which he had general supervision.

McCoy also flew functional check flights of the aircraft in his civilian maintenance status. United States Air Force Technical Order 1-1-300 prescribes certain types of functional checks required on aircraft that have undergone certain repairs, and provides for inspection (R. 48). In order to flight check airplanes in accordance with this Technical Order, it was absolutely necessary on occasion to take the planes off the ground. It was part of McCoy's duties to make these flight checks as part of his air technician's civilian job (R. 75, 76, 77, 79).

The flight order under which the particular flight was made (Pltf's Ex. 2, Flight Order No. 105, R. 209) did state in the printed portion of the form that it was "for purpose of maintaining flying proficiency." But this flight order was used for *all flights* regardless of the nature of the flight, including flights in connection with the maintenance of the airplanes (R. 69), and McCoy testified that during a proficiency flight he could, and did, perform the dual function of checking the performance of the equipment and evaluating the quality of the maintenance, and

as Aircraft Maintenance Chief, and as Captain in the Air National Guard, he could perform both these functions as part of the same flight (R. 493-495). During a flight he would check the way the aircraft handled and, in general, would have a better knowledge of the maintenance of the aircraft. These were all aspects of a general proficiency flight (R. 616).

In response to the question whether any officer performing an aerial flight would pay some attention to the maintenance of the aircraft, Kilkowski testified this might be true but that the judgment of a pilot who is not a maintenance officer would not be as qualified as that of a maintenance officer (R. 169, 170), and that there are technicalities to jet aircraft in regard to maintenance that would not mean anything to one who is not a maintenance officer, whereas McCoy, as a maintenance officer, as Aircraft Maintenance Chief, and as a pilot, was more capable of analyzing maintenance problems than the average pilot (R. 169, 170). Flying for proficiency related to McCoy's civilian job because he was required to maintain his proficiency in order to be qualified and competent to check and test aircraft (R. 138, 139). As part of his civilian maintenance job, McCoy performed functional flight checks on April 8, 13, 23, 24, 26, May 4, 10, 15, 16 and 17, 1958 (R. 70). The accident in question occurred on May 20, 1958.

The evidence showed conclusively that at the time of the occurrence McCoy was not flying the jet airplane on a training mission (R. 70, 80, 121, 136, 146, 147, 152, 153, 161, 163, 167, 586, 587). During the course of the flight in question, McCoy checked the efficiency of the equipment and evaluated the quality of the maintenance (R. 162-164, 493-495; Dist. Ct. Find. 21). The particular flight at the time of the accident was part of McCoy's function to maintain proficiency and maintain the equipment (Dist. Ct. Find. 22). In the *Meyers* case, the District Court

found, and the Court of Appeals agreed with that finding, that in his civilian capacity as a caretaker of property of the United States, McCoy, when on the flight in question, which entailed the performance of his caretaker and maintenance duties, was an employee of the United States within the terms of the Federal Tort Claims Act (Dist. Ct. Find. 23; 322 F. 2d 1009, at 1012).

In the light of the foregoing evidence and findings it is remarkable that respondent states to this court (U.S. Brief 4) that after a pilot has qualified for all of his flight pay, he is, when flying, "considered to be on military duty training status without military pay * * *," citing R. 127, 155, 156. The statement is obviously incorrect and examination of the pages of the record cited disclose, insofar as they have any relationship to the matter being discussed, that the witness was testifying, not to the work of a civilian air technician during his regular civilian work week, but to the activity of a member of the Guard present on duty for one of his 36 flying training periods per year, usually performed on a Saturday for "active" or "inactive" duty training on a prescribed training assembly or a prescribed flying training period (R. 154, 155, 156).

McCoy's military pilot's license permitted him to fly the plane, but it did not prescribe the use of the plane at the time of the flight (R. 79, 80). A pilot can do air technician (civilian) work while flying the airplane (R. 163, 164), and McCoy was the only officer maintenance supervisor of aircraft maintenance at the base, at the time of the occurrence, available to perform the necessary task of flying the aircraft to evaluate the equipment maintenance (R. 136, 137). On the day of the flight and during the course of the flight, McCoy was carried on the rolls as an air technician (R. 78), performed the duties of an air technician that day up to and including the time of the accident (R. 67, 78), and at the time of the accident, in his opinion, was flying in the capacity of a caretaker of gov-

ernment property (R. 80). On the flight in question McCoy's purpose was to check the quality control of the product he was maintaining, to evaluate the equipment as to its maintenance, and to maintain proficiency. He had a better opportunity to observe the quality of maintenance of the equipment by flying the plane (R. 70, 399), and during the flight he watched the instruments, observed that the plane was behaving properly, that there were no mechanical difficulties, and that the instruments were functioning properly (R. 120). Kilkowski, McCoy's superior, also testified that on the day of the occurrence, up to the time the accident occurred, McCoy was being paid as an air technician, and that he was performing the duties of an air technician until the accident occurred (R. 136).

Other than the fact that McCoy had to have a military license as a pilot from the United States to have the right to fly the jet airplane owned by the United States, his flying of the airplane at the time and place in question was no part of his work or duties as a military member of the Guard. McCoy had completed his authorized maximum flying for pay for the period involved (36 periods of 4 hours each of flying for purposes of military training), so that he could not earn any flight pay on the occasion in question. (Dist. Ct. Find. 25) He could be present for duty only in one pay status, either civilian or military; he was present throughout the day of Tuesday, May 20, 1958, in his civilian pay status, from the time he reported for duty until he was injured. His civilian work did include flying the airplanes at the base, both to check flight them when checking on specific repair work, and flying them to observe the quality of maintenance as it affected the flight and performance of the airplane, and enabled him to observe whether the maintenance work was being properly done on the airplanes. All maintenance work on the planes was done during the week by the civilian maintenance personnel who were under McCoy's supervision in the performance of that work. That was McCoy's job, all

day, every work day. The maintenance of the planes, like maintenance of any other machinery, could be effectively tested only after the work was done, by operating the machines or, in the case of airplanes, by flying them. McCoy was the chief maintenance officer at the base qualified to fly the planes for this purpose.

THE FOLLOWING FACTS AND CIRCUMSTANCES ESTABLISH THAT McCOY WAS ACTING IN THE COURSE OF HIS CIVILIAN EMPLOYMENT AS A MAINTENANCE SUPERVISOR OF FEDERAL PROPERTY AT THE TIME OF THE ACCIDENT.

1. McCoy was employed under the provisions of 32 U. S. C. §709, and was sent by the Air Force, to an Air Force School at Chanute, Illinois, to be trained to fill the job of a maintenance supervisor. He was paid by the United States while attending the school.

2. McCoy's entire salary for his full time air technician civilian maintenance job was paid by the United States.

3. He took an oath as an officer of the National Guard that he would obey the orders of the President of the United States, and the Governor of the State of Maryland, as required by 32 U. S. C. §312 (R. 492).

4. He received federal recognition which permitted him to hold his National Guard civilian job, and to receive federal pay. This recognition could be withdrawn by the United States at any time when in its opinion he ceased to have the qualifications required under 32 U. S. C. §301, or cease to be a member of a federally recognized unit, 32 U. S. C. §323. This would terminate his employment.

5. Under the requirements of 32 U. S. C. §324, it was compulsory that he be discharged from the National Guard if his federal recognition was withdrawn. Any right of the State to discharge him as an officer of the Guard was subject to the superior right of the federal government to compel his discharge by withdrawal of his Federal recognition under 32 U. S. C. §324.

6. The federal government owned and provided the airplane which McCoy was flying at the time of the occurrence, and it was subject to its ultimate control.

7. The federal government furnished and paid for the fuel used to operate the plane McCoy was flying. (Dist. Ct. Find. 3)

8. The federal government paid for all repairs, upkeep and maintenance of the airplane involved. (Dist. Ct. Find. 3)

9. The flight suit he wore during the flight was that required by the United States Air Force (R. 402).

10. The day of the week on which the accident occurred, Tuesday, was a day when McCoy always worked at his full time civilian job. (Dist. Ct. Find. 13)

11. He reported for duty that Tuesday morning at 8 o'clock in his civilian capacity. "This was a non-military day" (R. 396).

12. He was carried on the books for that day in his civilian pay status.

13. The work he performed that morning at the base prior to the flight involved solely his civilian work and duties. (Dist. Ct. Find. 26)

14. He examined the maintenance records pertaining to the aircraft that day before making the flight (R. 490).

15. The civilian work of the maintenance supervisor includes flying the airplane for purposes of better maintenance of the airplanes. (Dist. Ct. Find. 20)

16. At the time of the accident, McCoy was flying the airplane in an area authorized for a civilian caretaker from that base, during the regular working hours of a

civilian caretaker, and for a purpose for which a maintenance supervisor was authorized to fly the plane (R. 399).

17. Following the accident, after due investigation, a federal employee, Col. Ebaugh, United States Property and Fiscal Officer, certified that McCoy "was working as a civil employee of the United States at the time of the injury and *not* as a member of the Maryland National Guard."

18. Following such certification McCoy's claim for benefits under the Federal Employees' Compensation Act was duly processed, investigated by the Bureau of Employees Compensation of the United States Department of Labor, which adjudicated that McCoy was in the performance of his duty as an employee of the United States at the time of the accident.

The statement in respondent's brief that an officer of the Guard who is also a civilian air technician flies the airplane "in his military capacity" (U.S. Brief 5) cannot be helpful to this Court in determining what work McCoy was actually doing at the time of the occurrence. And the testimony of McCoy, partially quoted at p. 5 of respondent's brief, does not include other qualifying and significantly explanatory testimony by the witness on the subject.

We quote fully on this point from the record beginning at the bottom of page 117:

> "Question. Well, normally. In other words, when you are in the airplane you are really functioning in both capacities?
>
> "Answer. It is my belief that as an air technician when I get in an airplane I become a Captain in the Air National Guard, or I am a Captain in the Air National Guard qualified by the Department of the

> Air Force and its regulations to operate the aircraft, but I still have the responsibility as an aircraft maintenance chief to evaluate the condition of the aircraft."

Footnote 2 on the same page 5 of respondent's brief similarly requires correction. Respondent challenges as inaccurate petitioner's assertion that McCoy took his orders in his military status from Major Scott. The record shows the following at page 42:

> "Q. From whom did you take orders while in the military status? A. From the squadron commander—could I have my memory refreshed?
>
> "Q. Would that be Major Scott, as your deposition set forth? A. Major Scott."

And the foregoing review of the evidence demonstrates that in these particular cases it is not accurate for respondent to state to the Court (U.S. Brief 6) that the flight order directed McCoy to make a proficiency or "training flight," because under the particular circumstances, the terms "proficiency" and "training" are not really synonymous, even though there are times when the two terms might properly be used interchangeably.

The respondent, aware of the crucial aspect of this point, states in a footnote (U.S. Brief 6) that "petitioners' assertion that the flight 'was not a training mission' (Pet. Brief, p. 17) is incorrect, as shown above." This precise distinction was considered by the District Court for the District of Columbia in the *Meyers* case, when the court specifically found that "an aeronautical rating only allows a man to fly the aircraft if he obtains permission to do so. It does not determine his purpose or the work he is properly doing in flying that aircraft." (Dist. Ct. Find. 18), that during the course of the flight McCoy was checking the efficiency of the equipment in order to determine if it was working properly (Dist. Ct. Find. 22), that the

particular flight at the time of the accident was part of his function to maintain proficiency and maintain the equipment (Dist. Ct. Find. 23), that his work in flying the airplane could involve performance in a dual (military and civilian) capacity (Dist. Ct. Find. 25), and that in flying the airplane at the time of the occurrence, McCoy "was *at least* in part carrying out his civilian work as Aircraft Maintenance Chief and Acting Maintenance Supervisor of the Base" and was therefore an employee of the United States acting within the scope of his employment at the time of the occurrence (Dist. Ct. Find. 35). The court of appeals in the *Meyers* case also carefully recognized this distinction, and held that the findings of the district court on these points were "supported by the evidence, that the flight was within the caretaker function when the accident occurred" 332 F. 2d 1009, at 1012, footnote 3. The District Court for the Western District of Pennsylvania in the *Levin* and *Johns* cases made substantially the same findings (Dist. Ct. Find. 17, 21, 22, 24, 34; R. 696-699).

II.

As to respondent's claim that the court below did not find it necessary to set aside any specific district court finding.

Respondent states (U.S. Brief 9, footnote 6) that the opinion of the Court of Appeals, Third Circuit, "noted that less than usual weight should be given to the findings of the district court * * *" To be accurate, respondent should have conceded that the court of appeals gave no weight to the district court findings. The court stated, 329 F. 2d 722, at 723:

> "We are in as good a position as was the trial court to evaluate the evidence, draw the inferences of which

the evidence is reasonably susceptible, and decide the critical questions raised on this appeal."

The district court made specific findings in the *Levin* and *Johns* cases that McCoy was acting in his civilian caretaker capacity, performing the duties of his civilian job when flying the aircraft at the time of the accident, and was acting in the scope and course of his employment as an employee of the United States. The Third Circuit held that McCoy "was not acting within the scope of his employment as a maintenance technician but was acting within his line of duty as a commissioned aeronautical officer of the Guard" (329 F. 2d 722, at 731), and that even in his capacity as a maintenance technician he was an employee of the State of Maryland " " and "not a federal employee within the meaning of the Federal Tort Claims Act." (329 F. 2d 722, at 729).

This holding is diametrically opposed to the unanimous holding on the same facts and issues in the *Meyer* cases:

> "We hold with the District Court that in his civilian capacity as a caretaker of property of the United States Captain McCoy when on this flight, which entailed the performance of his caretaker and maintenance duties, was an employee of the United States within the terms of the Federal Tort Claims Act." (p. 1012)
>
> "Not only was the Captain an employee of the United States but he was also 'acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law' of Maryland where the negligence occurred." (p. 1014)

The above are in accord with the specific findings of the District Courts in *Meyer* and *Levin*.

Yet, in this state of the record, respondent states to this court that the Court of Appeals in the Third Circuit, "did not, however, find it necessary to set aside any specific District Court finding." (U.S. Brief 9, footnote 6). In fact, the court below clearly disregarded these findings and proceeded to make its own findings of fact.

Petitioner's counsel has carefully read the latter half of footnote 6 on page 9 of Respondent's Brief, and confesses that it is still not clear what respondent is attempting to convey in its rather oblique inferences. It should be stated however that there is nothing inconsistent in the findings of the District Court below with the dual status of McCoy, which it particularly noted. The findings were also specifically approved in the dissenting opinion of Judge Staley. Is respondent suggesting that the government is liable in *Meyer* and not in *Levin*?

III.

As to respondent's admissions in its briefs that McCoy was acting in a civil maintenance capacity.

Respondent has not seen fit to answer or comment on its admissions in its briefs previously filed in these cases and in the *Meyer* cases, admissions which are set forth on pp. 20 and 21 of the Brief on Behalf of Petitioners. It was there shown that respondent admitted in its briefs in the lower courts that McCoy was, in fact, acting *at least in part* in his civilian capacity at the time of the occurrence, engaged in maintenance activity, admissions which the majority of the court in the Third Circuit apparently overlooked or misconstrued when that court held that McCoy "was not acting within the scope of his employment as a maintenance technician * * *" and that it was "of no relevance" that McCoy was carried on the

payroll in his civilian status from the day of the occurrence, or that on the flight in question, he checked performance of the aircraft and reported thereon; 329 F. 2d 722, at 731. Judge Hastie, in his concurring opinion, likewise apparently completely overlooked these admissions by respondent in its briefs; otherwise, he would not have held that the flight "was not an undertaking of a civilian caretaker in performance of his responsibility for aircraft maintenance" 329 F. 2d 722, at 731.

Furthermore, Judge Staley in his dissenting opinion, as reported, footnote 1 on page 734, noted that the government brief stated:

> "Both Captain McCoy and Lt. Col. Kilkowski testified that in their opinions they believed that Captain McCoy was performing duties in his civilian capacity as well as his military capacity, at the time of the accident."

Respondent admits (U.S. Brief 54) that on the flight in question McCoy, "in his civilian capacity as air technician, observed the performance of the aircraft and its equipment, as well as other mechanical aspects of the flight. This, as his commanding officer stated, was 'a secondary portion of any flight.'"

It should be observed that this represents a change by the respondent from its position on this issue as set forth in the Pretrial Order in the District Court in the *Meyer* cases that the position of the United States on the agency issue was that "while making this flight, he (McCoy) was performing *no duties* of his civilian employment. . . ." (*Meyer* cases, U.S. Court of Appeals for the District of Columbia Circuit, No. 16,953, etc. Joint Appendix 14). The conduct of a servant is regarded as within the scope of his employment if it is the kind of work he is employed to perform, if it occurs substantially within the authorized

time and space limits, and if it is actuated, *at least in part,* by a purpose to serve the master. Restatement of the Law of Agency, 2d §228, p. 504 (1958).

IV.

As to respondent's contentions that the court in the *Holly* case was mistaken in its assumptions of fact.

Respondent urges that civilian caretakers are only under the control of state officers (U.S. Brief 20, 21), that adjutants general are state employees (U. S. Brief 21, 45-47), and that the Secretaries of the Army or Air Force were only authorized by Congress to "designate" state officials to employ caretakers, and never had authority to actually employ caretakers, and that the Tenth Circuit was mistaken in the *Holly* case, 192 F. 2d 221, at 222, when it believed authority to employ caretakers was vested in the Secretary of the Army or the Air Force and "delegated" to adjutants general by regulation (U. S. Brief 46). There was no "mistake of fact" by the Tenth Circuit in the *Holly* case, or on the part of the many judges of other courts of appeal who agreed with the holding in the *Holly* case.

32 U. S. C., §709(a), which authorized the employment of "Caretakers and Clerks" provided, in pertinent part, that:

> "Under such regulations as the secretary of the Air Force may prescribe, funds allotted by him for the Air National Guard may be spent for the compensation of competent persons to care for material, armament and equipment of the Air National Guard. A caretaker employed under this subsection may also perform clerical duties incidental to his employment and other duties that do not interfere with the performance of his duties as caretaker."

Section 709 (b) provided that enlisted members of the Guard "and civilians" may be employed as caretakers under this section.

Section 709 (f) stated that the secretary shall fix the salaries of clerks and caretakers and designate the person to employ them.

National Guard Regulation No. 75-16, December 29, 1947, Plaintiffs' Exhibit 15 (R. 634-645), promulgated by the United States, provided that accounting clerks and caretakers of federal material and equipment provided for the National Guard are employees authorized under § 90 of the National Defense Act (the forerunner of 32 U. S. C. § 709). This regulation stated:

> "The Secretary of the Army has *delegated* to the several adjutants general of the States, Territories and the District of Columbia, authority to employ, fix rates of pay, establish duties and work hours (not to exceed 40 hours per week), and to discharge employees within the purview of this regulation; subject to the provisions of law and such instructions as may from time to time be issued by the chief, National Guard Bureau." (R. 635). Appendix A-5, Brief on Behalf of Petitioners. (emphasis ours)

National Guard Regulation No. 75-16, January 7, 1953, (R. 647), Appendix A-8, Brief on Behalf of Petitioners, states that these regulations outline the qualifications, duties, rights, and obligations of certain designated personnel (including the caretakers here under consideration) and again states that the Secretary of the Army has "delegated" to the adjutants general the authority to employ, fix rates of pay, establish duties and work hours, etc.

Air National Guard Regulation No. 40-01 (ANGR 40-01) (R. 652), Appendix A-9, Brief on Behalf of Petitioners,

provides in § 3. Authority, that "Basic authority" for the employment of civilian personnel is contained in § 90 of the National Defense Act, and that this authority is "delegated" to the adjutants general, as previously indicated, subject to the provisions of law and such instructions as may be subsequently issued by the National Guard Bureau. The Air National Guard manual 40-01 (ANGM 40-01), Plaintiff's Exhibit 3 (R. 210), Appendix A-11, Brief on Behalf of Petitioners, issued by order of the Secretary of the Air Force, by the Chief of the National Guard Bureau, states that the manual will govern all civilian employees of the guard, and the manual sets forth in detail the duties and responsibilities of these civilian personnel including the maintenance supervisors and the aircraft maintenance chiefs.

It is clear that the court in the *Holly* line of cases did not err in holding that the authority to employ caretakers was vested in the Secretary of the Air Force and was "delegated" to the adjutants general by federal regulation. The Act of Congress, the orders of the National Guard Bureau, a federal agency, issued pursuant to orders of the Secretary of the Army, and then by authority of the Secretary of the Air Force, all unequivocally indicated that the authority to employ the civilian personnel of the Air National Guard was reposed in the federal government and was delegated by the National Guard Bureau to the adjutants general, subject to continuing federal supervision and control. The Secretary of the Air Force and the National Guard Bureau could not delegate authority to the adjutants general unless they had the authority to do those acts which they delegated to lower levels for purposes of administrative convenience.

ANGM 40-01 (Pltfs.' Ex. 3, R. 210) issued by order of the Secretary of the Air Force, March 1, 1958, by the

Chief of the National Guard Bureau provides that the provisions of the manual "will govern all National Guard civilian employees . . ." (p. 211) and further states, p. 214, that:

> "3. Delegation of Authority.
>
> The authority of the National Guard Bureau to regulate the employment and rates of compensation is contained in Department of the Army General Order 96, dated 9 November 1951, subject, 'Delegation of Authority for the Employment and Fixing of Salaries for all Caretakers and Clerks in the National Guard Bureau.'"

The manual further provides, contrary to respondent's statement that "the only federal duty" imposed upon adjutants general is to make returns and reports to the Secretaries (U. S. Brief 21) as follows concerning the adjutants general (R. 214):

> "5. Responsibility
>
> a. Adjutants general of various States, Territories, Puerto Rico or the District of Columbia will be responsible for:
>
> (1) Insuring that the requirements and policies of the Air National Guard position classification program are followed at all air technician detachments.
>
> (2) Furnishing recommendations, suggestions, and information to the National Guard Bureau on matters pertaining to classification standards, or on policies, techniques, and procedures affecting the position classification program.
>
> (3) Maintains contact with the Civilian Personnel Office at nearest military installation and assists him in gathering information necessary for proper adjustment of the locality pay schedule."

The manual then sets out in detail the responsibility of the base detachment commandant for senior air technician.

The manual then further states there are two major categories of positions in the National Guard Air Technician Program, the National Guard Classified (NGC) type and the National Guard Maintenance (NGM) type. The job of maintenance supervisor is part of the NGC listing, job No. 43-00, and the manual states that the National Guard Bureau is guided by the Classification Act of 1949, and pay rates for this category are controlled by Congressional action. McCoy was the acting maintenance supervisor at the base at the time of the occurrence, and formerly had been the maintenance supervisor until a few days before the accident.

Similarly, the job of Aircraft Maintenance Chief is described in the manual (R. 218) as a job of grade NGMS-9, Job No. 43-10. The manual states that this category of job is characterized by trade, craft, maintenance and labor type positions, similar to the United States Civil Service Wage Board positions, and pay rates are adjusted by periodic surveys conducted by the Army-Air Force Wage Board. The third category under the NGM heading is "National Guard Maintenance-Supervisor" (NGM-S) and the manual states that it includes technically skilled positions primarily concerned with direct supervision of the duties and tasks assigned to the employees in positions indicated in the manual, referred to as National Guard Maintenance, and National Guard Maintenance-Leader. The manual further states that a copy of it will be available for review and reference by supervisors and employees, and that ready access to it is "essential" for an understanding by Air National Guard civilian and military commanders of the responsibilities of Air National Guard civilian personnel (R. 215).

Air Force Regulation 45-2 (AFR 45-2), issued by the Department of the Army and the Air Force, April 13, 1949 (Pltfs.' Ex. 7, R. 233), entitled "National Guard General Provisions," states that the National Guard Bureau is charged with administering approved joint Army and Air Force policies other than those relative to training when those policies are applicable to both the Army National Guard and the Air National Guard, not in federal service, and with promulgating joint Army-Air Force directives and regulations applicable to both the Army National Guard and the Air National Guard, including those relating to training (R. 233, 234). AFR 45-2 further provides that the National Guard Bureau will from time to time publish joint National Guard Regulations which:

> "will govern the Army National Guard and the Air National Guard when not in Federal service in the same manner as Army Regulations or Air Force Regulations govern the Regular components of the service." (R. 235).

AFR 45-2 further provides:

> "National Guard Regulations pertaining to the Air National Guard only will be issued subject to the approval of the Chief of Staff, United States Air Force." (R. 235, 236).

Respondent asserts that if Congress had agreed with the *Holly* line of cases, that negligence of civilian personnel of the National Guard was covered by the Tort Claims Act, it would not have found it necessary to provide an administrative remedy for claims based on negligence of such personnel (R. 39). The respondent also argues that by treating military and civilian personnel on the same basis, Congress must have accepted the view that the Guard was under state rather than federal

control and was not accepting the *Holly* line of decisions. The argument is untenable. The legislation itself merely provided for administrative procedures to permit recovery up to $5,000.00, and that anything beyond that amount would be submitted to Congress. This legislation did nothing more than provide a limited administrative recovery and does not purport to overrule or replace the judicial remedy available under the *Holly* line of cases. Respondent apparently refuses to stand behind the statement of its Deputy Attorney General when the proposed legislation was under consideration, a statement which, as Judge Fahy pointed out in the *Meyer* cases, was repeated virtually verbatim by the First Assistant, Civil Division, Department of Justice, before a House Committee on the Judiciary (the Deputy Attorney General's statement was made to the Chairman of the Senate Committee on the Judiciary), in which the Congress was advised that the legislation in the form in which it was then being proposed, to include civilian employees of the National Guard employed under 32 U. S. C. §709 within the definition of "employee of Government," was unnecessary because the Government's responsibility already exists under the Federal Tort Claims Act; that "an unbroken series of court decisions" had so held.

V.

As to respondent's version of the "caretaker statutes" history and the intent of Congress.

Respondent discusses the history of the caretaker statutes, asserts that Congress intended only to allow the Secretary of the Army or Air Force to designate State officials to employ caretakers, and that these caretakers are not to be considered federal employees. But there is nothing in any of the legislation to which respondent re-

fers that warrants its final conclusion that the caretakers should be considered state and not federal employees.

As the court of appeals pointed out in the *Meyer* cases, 322 F. 2d 1009, at 1013:

> "In his (McCoy's) property maintenance function he was paid by, and the ultimate right of control over him was in, the United States. The functions lodged by the United States in the State Adjutant General did not serve to supplant this right of control in the United States though it may be said to have been ancillary thereto. * * * There is of course a close relationship between the State of Maryland and the United States in the maintenance of federal property allocated to the Maryland National Guard, but this does not tip the balance toward the State on the issue of employment; for too much begins and remains with the United States in the case of these caretakers of federal property."

And, further:

> ". . . [I]n an ultimate sense the right of control was in the Federal Government at the time and in the circumstances of this accident, notwithstanding immediate authority or permission for the flight was given by the State through its militia officers."

The respondent further argues that in rejecting a bill to extend coverage of the Tort Claims Act to Guard personnel in 1960, Congress indicated that civilian caretakers were state and not federal employees (U.S. Brief 24, 25, 37, 38, 39). And respondent argues that in this legislation in 1960, Congress treated civilian employees of the Guard as well as military members as employees of the state "in the very context of the Federal Tort Claims Act" (U.S. Brief 37). This identical contention was rejected as unsound by the court of appeals in the *Meyer*

cases, 322 F. 2d 1009, at 1013, where the court pointed out that this argument by the Government:

> ". . . [C]learly misses the significance of the position of the Deputy Attorney General insofar as the present case is concerned. The thrust of his objection to the proposed legislation, S. 1764, 86th Cong., 2d Sess. (1960), which would have amended the Tort Claims Act as to both classes of persons, was that it would change existing law as to federal liability for acts of Guardsmen when on regular training duty under State control. As to the provision expressly including civilian caretakers under the term 'employees of the Government,' his position was that it was unnecessary because it would merely restate existing law." See footnote 4 of the opinion.

The court further pointed out that the distinction between members of the National Guard and persons employed pursuant to §709 is also noted in hearings before a subcommittee of the House Committee on the Judiciary (322 F. 2d at 1014), where the first assistant, Civil Division, Department of Justice, made a statement concerning §709 employees identical to the terms used by the deputy attorney general. The new statute did not add to the coverage of the Tort Claims Act, and with respect to injuries caused by civilians employed under §709, the new statute merely created a limited administrative recovery as an alternative to the traditional judicial one under the Federal Tort Claims Act, an administrative remedy which could have no application to the claims of the petitioners in these cases which arose in 1958 (322 F. 2d 1014, and footnote 5). In passing, it may be noted that the Third Circuit, in the *Levin* and *Johns* cases, attached no importance whatsoever to this argument of the Government concerning the 1960 legislation.

There is no valid basis for respondent's contention that Congress considered civilian personnel as state employees or that they are as much under state "command and control" as Military Guard members. The United States does not contend that passage of 74 Stat. 878, Public Law 86-740, which took place more than two years after the occurrence in question, in any way impairs whatever right petitioners have to recover under the Federal Tort Claims Act, and merely argues that the passing of this law shows the intent of Congress prior thereto to regard "caretakers" in the same light as "members" of the Air National Guard. It seems clear that under the provisions of §90 of the National Defense Act of 1916, and its amendments, the position of caretaker is created by Act of Congress, the federal funds for his pay come from money allotted by the Secretary of the Air Force, paid through the National Guard, and the compensation to be in addition to any compensation authorized for members of the National Guard. The Secretary of the Air Force has prescribed regulations concerning the employment of caretakers, fixed their salaries and designated by whom they shall be employed.

The House of Representatives, Report 297, 34 Cong., 1st Sess., clearly illustrates the power of Congress to organize, arm and discipline the militia and points out the fact that the states have only the authority to appoint officers and to train them. While the state may superintend the actual drill and instructions of the National Guard, observance of all things which go to make up military discipline must be according to federal standards.

The Government refers to House Report No. 1031, 69th Cong., 1st Sess., and states "the purposes of the amendment were to secure the more efficient maintenance and care of airplanes and to supply an officer constantly on duty . . . for the supervision of flying training". On

p. 5 of this report as an illustration of this, the Committee discusses the power and authority of the federal government to organize, discipline, govern, and use the National Guard under the Constitution. It says:

> "Save and except the appointment of officers reserved to the states, but one power remains in the states, and that is to train the militia according to the discipline prescribed by Congress. What does this mean? It means that while the states shall superintend the actual drill and instruction of the National Guard such instruction must be according to the discipline prescribed by Congress; that is to say, the method of drill and instruction, and the observance of all things which go to make up military discipline must be according to federal standards. To use a homely illustration, the case is as though the federal government should state to the States: 'You must educate your children in certain schools; you may name the teachers, provided such teachers present the qualifications we prescribe; these teachers may instruct your students, provided they use our textbooks, the course of study we prescribe, the length of hours of recitation we elect, examine them according to our requirements and mete out such punishment for their delinquencies as we designate.' It would seem that under these conditions the school would be rather largely controlled by the federal headmaster."

It is submitted that there is no convincing basis for saying that a civilian caretaker is not an employee of the United States. Congress has had many opportunities to so state prior to and since the decision in the *Holly* case, and has not done so, although the point has been raised in the courts on numerous occasions, and the difference of viewpoint on this question between certain departments of the Government has actually been brought to the atten-

tion of Congressional Committees. It is apparent that on each occasion when the question has arisen, the Congress has accepted the decisions of the courts on this issue. No one who has read the statute, and the regulations and manuals, and has studied the activities of the civilian caretakers, can soundly contend that the civilian caretaker of federal property is a state employee. In every sense of the word he is a federal employee.

VI.

As to respondent's "independent contractor" argument.

The respondent argues that the fact the federal government prescribes conditions for federal support does not mean air technicians in their civilian capacity are employees of the United States under the Tort Claims Act, and seeks to draw an analogy between civilian employees maintaining federal property under federal regulations and control and employees of independent contractors who respondent states are excluded from the Tort Claims Act (U.S. Brief 22). 28 U. S. C. §2671 does provide that "federal agency" does not include any contractor with the United States, but it does not exclude liability of the United States under the Act where it retains sufficient right to control the doing of the work by the so-called independent contractor. In *State of Maryland, for Use of Pumphrey* v. *Manor Real Estate & Trust Co.*, 176 F. 2d 414 (4th Cir. 1949), the Public Housing Authority had leased premises from the owner, had sublet to defense workers, and had employed a management agency to operate the premises. The Government contended the management agent was an independent contractor and not an employee of the United States. The court held that the detailed supervision which the managing agent was subject

to by the Public Housing Authority, and his agreement to be bound by regulations issued by the Government, constituted him an employee for whose acts the United States was responsible under the Tort Claims Act. In *Strangi* v. *United States*, 211 F. 2d 305, 308 (5th Cir. 1954), relied upon by respondent, the Government, in constructing Whitney Dam and Reservoir on the Brazos River, entered into a written contract with one Mayfield to clear brush, timber and trees from the Reservoir area, and Mayfield in accordance with the contract burned the brush and timber he cleared. A fire originating on the border of the Reservoir area burned over and destroyed the properties of the appellant. In an action brought under the Federal Tort Claims Act, the Government showed that Mayfield furnished his own material and appliances, employed his own help, approximately 75 men, and was doing the work as the best bidder pursuant to his calling as a general contractor, was to be paid a lump sum for the specific job and would be penalized for delay in completing the work. The Government did impose certain regulations for the doing of the job, and the court pointed out p. 307:

> "The distinction between the master-servant and independent contractor relationship lies largely in the degree of control or right of control retained by the employer over the details of the work as it is being performed, but there is no definite and absolute rule."

The court held Mayfield was an independent contractor, and with respect to the contention of the claimants that there was negligence on the part of direct employees of the Government, the reviewing court held that the district court's findings of fact of no negligence on the part of the United States were not clearly erroneous, Rule 52 (a), Federal Rules of Civil Procedure, and would not be disturbed. Respondent also cites on this question *United States* v. *Silk*, 331 U. S. 704, 712. That case in-

volved the question whether certain persons were employees within the meaning of the Social Security Act, and although the tests for the distinction between an employee and an independent contractor, or between an agent and an independent contractor, are discussed, the court stated that to effectuate the purposes of the act it rejected the "technical concepts" governing an employer's legal responsibility to third persons for acts of the employer's servant, a concept referred to as the "power of control." The individuals concerned were held independent contractors. They were driver-owners of trucks, small businessmen who owned their own trucks, hired their own helpers, in one instance hauling for a single business and in the other hauling for any customer. There is nothing in the *Silk* case which offers any valid support for respondent's defense in the present cases.

Nor do the myriad of state programs and enterprises for which the federal government has furnished funds administered by the states throw any true light on the relationship existing between the United States and civilian employees hired under the authority of and pursuant to 32 U. S. C. §709 to maintain and take care of federally owned property allocated to National Guard Units. (The United States by Act of Congress established this special class of "caretaker" to take care of federal property allocated to National Guard units that the military members of the unit could not properly take care of themselves.) Col. Kilkowski explained that the duties of the air technicians were to provide continuity, during the week, of plans and programs of the units by doing all those things the units could not do in their military status, such as maintain the aircraft. The military units only met for four periods a month and naturally could not maintain the aircraft or maintain all the records associated with the military, so the civilian technicians at the base did this work in accordance with the Air Force

regulations, providing administrative and maintenance services (R. 123, 124).

According to General Wilson (R. 292), these air technicians, hired under Sec. 709 are full-time civilian personnel,

> "who are placed there to maintain federal equipment and records to the prescribed standards of the Air Force that cannot be maintained by the normal personnel assigned to the active establishment, I mean to the active Guard unit."

The Air Guard program is unquestionably vital to the national defense of this country, and the importance of the air-technician plan to a success of the Air Guard program was emphasized by General Wilson, Chief of the National Guard Bureau (Hearings before House Appropriations Committee, 84th Cong., 2nd Sess., Vol. 4, relative to Dept. of Air Force appropriation for fiscal year 1957, p. 1000) where the following occurred, General Wilson speaking:

> "We think the air-technician plan is one of the big reasons we have had the success which we have had in the Air Guard program.
>
> Mr. Mahon: You think it has been helpful from the standpoint of maintenance of the airplanes, and from the standpoint of safety, and so forth?
>
> Gen. Wilson: Yes, sir; we think by having these people there year in and year out that they increase the capability of maintaining airplanes because we send them to school, and they know they will come back to work on the equipment we have. I think, personally, the reason we have been able to fly the F-89

and the F-84-F—the high-performance aircraft—is because of the maintenance capability we have. * * *"

It is not fairly analogous to compare federal assistance to what are primarily state projects with federal control over the Air National Guard which Congress has described, 32 U. S. C. §102, "as an integral part of the first line defenses of the United States . . . , "or with civilian personnel employed to maintain federal property, when the Air National Guard could not exist or function without the said maintenance and without the said federal property and equipment.

Respondent asserts that the regulations imposed by the United States over activities of Guard units is similar to the control exercised by a party over the conduct of employees of an independent contractor, but that state officials, although given specifications to meet, retain ultimate control over the supervision and direction as well as the hiring, discharge and working conditions of the employees (U.S. Brief 52). Respondent can only make an argument so completely untenable by disregarding the provisions of National Guard Regulation No. 75-16 (Appendix A-5, Brief on Behalf of Petitioners), and the many other Air National Guard and Air Force regulations governing the work and duties of civilian caretakers which show, with reference to the employment of employees authorized under §90, National Defense Act (which later became 32 U. S. C. §709), for the administration and care of material, armament, vehicles and equipment of federal government allocated to National Guard units, that the Secretary of the Army and the Secretary of the Air Force "delegated" their authority to employ, fix rates of pay, establish duties and work hours (not to exceed 40 hours per week), and to discharge such employees, to the several adjutants general of the States, Territories and the District of Columbia, such delegation of authority, however,

to remain subject to the provisions of law and such instructions as may from time to time be isued by the Chief of the National Guard Bureau, a federal agency. No such authority can fairly be compared to the control that a party might have the right to exercise over employees of an independent contractor. Federal officials had the right to control McCoy in the performance of his work and the manner in which the work was done, as shown by the numerous federal regulations issued by the National Guard Bureau and by the Air Force, and did in fact exercise that right.

VII.

As to respondent's "militia" argument.

Respondent asserts that Guard members are clearly excluded from the terms of the Tort Claims Act which bars any claim that military personnel of the Guard are employees of the Government under that Act (U.S. Brief 25). Respondent neglects, however, to discuss *Layne* v. *United States*, 295 F. 2d 433 (7th Cir. 1961), certiorari denied 368 U.S. 990, discussed in detail in the amici curiae brief 39, 40, in which the court held that Major Layne, a member of the Guard of a unit which had not been activated, and who was not employed as a caretaker, was held while engaged solely in a military training mission to be an employee of the United States.

Respondent states (U.S. Brief 27) that McCoy "received pay under this statute "as an air technician, referring to 32 U.S.C. §709. The evidence was not merely that McCoy received pay under that statute but General Wilson testified that McCoy was employed pursuant to it (R. 59). McCoy testified to the same effect, and that the statute correctly described his civilian job (R. 81). Significantly, the air technicians were instructed both by the Department

of the Air Force and by the Air National Guard that as air technicians they are subject to the Hatch Act (R. 143).

Respondent states that only State officials control Guardsmen, in their military and civilian capacities, and that State officials have the exclusive right to employ, promote, demote or discharge these personnel, or to supervise and direct their activities, and that no federal official has authority to perform or exercise these functions (U.S. Brief 34, 35). General Wilson testified that there are no units of the National Guard in existence which have not been federally recognized, that these units have to be federally recognized if they are to receive federal support (R. 313), that all promotions in the unit are subject to federal recognition and consent, that all training in the unit is pursuant to federal procedures and training directives established by the designated agency of the Air Force and approved by the National Guard Bureau, and promulgated by the National Guard Bureau; that all equipment in the unit is federally supplied (R. 314); that the procedures for maintenance of the aircraft are set out in accordance with regulations and standards of the Air Force (R. 314); the Chief of the National Guard Bureau, from the offices of the Bureau in the Pentagon promulgate the Air Force regulations and Air National Guard regulations and McCoy was subject to these regulations in the performance of his work (R. 322). The National Guard Bureau maintained an Air Force advisor at the base where McCoy worked and the advisor's duties were to see that the unit operated and maintained the equipment in accordance with the standards prescribed by the Air Force, and if the unit did not comply with federal requirements, federal recognition would be withdrawn, which would mean the withdrawal of all federal equipment and federal support (R. 324). The Air Force Advisor also flew the planes assigned to the unit in carrying out his responsibility of maintaining certain efficiency standards (R. 365).

Col. Ebaugh, the United States Property and Fiscal Officer, on active federal duty stated that his assistant, Base Supply Officer, Major James I. Considine was located at Martin Field, supporting the unit. Considine was an air technician, occupying the same position as Col. Kilkowski and Captain McCoy, permanent-duty technicians employed at the base. Ebaugh stated that Considine "as a civilian technician . . . was working directly under me." ". . . he answered to me." (R. 247). As to Ebaugh's relationship to Col. Kilkowski, Ebaugh stated that Kilkowski was to see to it that Ebaugh's assistants at the base were properly discharging their duties in support of the air unit (R. 247). Ebaugh usually maintained contact with the base by having his assistant come to Ebaugh's office, but when Ebaugh did go to Martin Field on a few occasions during the year, he would check over the supply procedures, stocks of supplies on hand to support the unit, and meet with his controller there to check on the handling of federal moneys. If he found anything that dissatisfied him, he would cause action to be taken immediately to clear it up. If warehousing was being improperly handled, he would cause personnel working for Major Considine to stop what they were doing and straighten them out. This would consist of technicians working in the supply area for Major Considine, at the base (R. 247, 248).

The regulations of the Air Force which include the Air National Guard regulations govern the unit although the State may expand on the regulations as long as they comply with the federal regulations (R. 331, 332). The United States can bring about the discharge of a civilian employee of the Air National Guard unit if United States concludes that he is not meeting requirements, by stopping his salary (R. 335). The result is that no person becomes and remains a member of the Air National Guard unless he is federally recognized, and if federal recognition pre-

viously granted is taken away from him, it brings about his discharge from the Guard. Col. Kilkowski testified that if an officer was coming into the unit, applying for admission, and held a United States Air Force Reserve commission, his papers would be processed through the National Guard Bureau. If federal recognition was not extended they would have to "get rid of him." (R. 134).

The statement of respondent that the court in the *Meyer* cases held that "because a civilian employee of the Guard is 'paid by' the United States, 'the ultimate right of control over him' is in the United States" (U. S. Brief 45) does not fairly state the position of the court. It would not be necessary to read the opinion to know that the court would not rest its conclusion that McCoy was a federal employee on that narrow ground, that he was paid by the United States, even though that was a factor, to be considered with all the other facts and circumstances, in determining the relationship between the civilian caretaker of federal property, and the federal government. The court rested its conclusion that McCoy was a federal employee, however, on all the facts and circumstances shown by the evidence including the fact that "the ultimate right of control over him was in" the United States; and, "in an ultimate sense the right of control was in the Federal Government at the time and in the circumstances of this accident . . . ." (322 F. 2d 1009, at 1013).

On page 18 of its brief respondent refers to an article entitled "The Militia Clause of the Constitution", 54 Harvard Law Review 181. A reading of the same demonstrates that the modern National Guard is an essential part of the national military arm of our federal government, paid for, equipped and trained by it, and designed as an integral part of our national defense system.

> "The scope of federal control authorized by the 1916 Act completely transformed the Guard. Not

only were the States required to conform to the provisions of the law to obtain federal aid, but they were not permitted to maintain troops at all, except as Congress had provided or as the President might, under the authority delegated to him thereafter direct. And the Guard from now on was not to consist merely of infantry and cavalry units fit only for parades or riot duty. It was to be organized as to form complete higher tactical units. Regular Army officers might be detailed as chiefs of staff of National Guard divisions, and they were authorized to accept commissions in the Guard without prejudicing their commissions as Regulars. More drills were required, and provision was made for a National Guard Reserve.

Nor was that all. The constitutional provision, 'reserving to the States . . . the Appointment of the Officers,' was sharply curtailed by sections of the Act which prescribed the qualifications of National Guard officers, and made provision for their recognition by the federal authorities and for their elimination in case they should be found disqualified. No officer was eligible to receive federal pay unless he was federally recognized. The States might propose; the Army would dispose." (pp. 200-201, footnote omitted)

As was concluded by the author ". . . a well regulated militia is impossible of attainment under the militia clause and can be organized only by resort to the plenary and untrammelled powers under the army clause." (p. 209).

VIII.

As to respondent's "right of control" argument and the Maryland decisions.

The Maryland cases upon which respondent relies (U. S. Brief 48, 49) were discussed in the amici curiae brief, 33, 34, 35, and petitioners will not burden the Court with further discussion of them. Those cases do not support the holding of the Third Circuit under the facts of the *Levin* and *Johns* cases.

Respondent recognizes that a person can be the employee of two employers at one and the same time (U. S. Brief 49) but states that this is a case where McCoy was a "shared servant" with control alternating between the United States and Maryland, and that the right to control McCoy was in the State of Maryland when the accident happened. The question as to who had the right to control and supervise McCoy was considered fully in the *Meyer* cases where Judge Fahy pointed out, 322 F. 2d 1009, 1013-1015, that in accordance with the tests laid down under the law of Maryland, *Keitz* v. *National Paving and Contracting Co.*, 214 Md. 479, 491, 134 A. 2d 296, 301 (1957), the decisive test is whether the employer has the right to control and direct the servant in the performance of his work and in the manner in which the work is to be done and that this right of control was in the United States, notwithstanding the State also could be said to have some supervision of McCoy's activities. And it is appropriate to again note that the respondent admitted in its Petition for the Writ of Certiorari in the *Meyer* cases that "the result reached by the Court of Appeals did not stem from any misapprehension as to State law" (Petn. 22). In *Keitz*, supra, the driver of the truck involved was an employee of Sudbrook, an independent

contractor who agreed to do certain work for National Paving and Contracting Co. The court held that the employee of the independent contractor could also at the same time be the servant of the person who employed the independnt contractor.

In support of its argument that even if McCoy was an employee of the United States when engaged in his caretaker duties, he was also at times an employee of the State of Maryland while engaged in military duties, and that he was engaged in performing military duties when the accident occurred, respondent cites *Fries* v. *United States*, 170 F. 2d 726 (6th Cir. 1948), certiorari denied 336 U. S. 954 (U. S. Brief 49, 50). In *Fries*, a venereal disease treatment project was conducted by and under the control and management of the Louisville and Jefferson County Board of Health of the State of Kentucky, with the aid and cooperation of but without direction from either the United States Public Health Service or the Kentucky Board of Health. It was a local project, 170 F. 2d 726, at 729. The United States Public Health Service had no control over the money, personnel or equipment after its transference to the project (p. 728). The negligent driver, Croslin, was hired locally solely for the project. The complete absence of any control or right to control Croslin on the part of the United States, and the complete absence of any right in the United States to prescribe his duties or responsibilities demonstrate that the *Fries* case does not support respondent's contentions that if McCoy was a federal employee he should be treated as a servant lent to the State of Maryland.

Respondent also cites on this proposition *Pattno* v. *United States*, 311 F. 2d 604 (10th Cir. 1962), certiorari denied 373 U. S. 911 (1963), (U. S. Brief 50, 51). In *Pattno*, the court held, at 606, that a "caretaker" is an

employee of the United States, citing *United States v. Holly*, 192 F. 2d 221 (10th Cir. 1951), and in *Pattno*, footnote 11, the court cited numerous other cases which followed and approved of the decision in *Holly*. The court further held, however, that Meckem, the pilot of the plane, was a flying training instructor engaged at the time of the accident in a flight to evaluate the flying skill of Anderson, a member of the Wyoming Air National Guard, and that while training a member of the National Guard, Meckem was performing work which, under the federal constitution and statutes, was the business and responsibility of the State. Meckem's duties did not include maintenance work or the supervision of the work of maintenance of federally owned airplanes and, although hired under the same statute as McCoy, Meckem had no caretaker maintenance functions or duties. *Pattno* is further distinguishable by reason of the fact that the law of Wyoming under which the case was decided holds that one of the most important tests governing application of the doctrine of "respondeat superior" is "who *had* control over the servants." This test is much more restrictive than the test for "respondeat superior" under the law of Maryland which inquires "who had the *right* of control," and also holds that it is not "the manner in which the alleged master actually exercised his authority to control and direct the action of the servant . . . but it is his *right* to do so that is important;" *Keitz v. National Paving and Contracting Co.*, 214 Md. 479, 491, 134 A. 2d 296, 301 (1957). This broader application of the doctrine of "respondeat superior" under the law of Maryland was relied upon by the court of appeals in the *Meyer* cases.

IX.

As to the Respondent's characterization of the flight.

This Court is informed by respondent that the *flight clearance* "revealed that the purpose of the flight was 'general training, operational training,'" citing (R. 207, 595-596). (U.S. Brief 53). R. 207 contains the flight clearance with the letter "O" in the upper right hand corner in the box bearing the word "mission." At R. 595-596, Kilkowski, on his pretrial deposition, stated that he would have to get the manual to get the exact definition for that symbol, but that it indicates flight in aircraft general training, operational training. It was evident he was not giving the precise meaning of the letter "O," and indicated he would want to refer to the manual for that. On the trial, after he had apparently refreshed his recollection as to the meaning of that symbol, he testified that it would be a "proficiency or operational mission, as opposed to 'X-3' for functional check flight. . . ." Respondent then argues, in effect, that McCoy was on a military training flight, and that the findings of the district court establish that it was "a training flight" (U.S. Brief 53). The findings of the district court do not establish that the flight was a training flight and respondent can point to no language that so holds. In fact its findings are to the contrary. (Dist. Ct. Find. 21, 22, 25, 34) Nor can it be properly stated that it is "uncontroverted" that "proficiency" is military terminology for "training" and is the same as a "training flight" (U.S. Brief 53). Kilkowski, attempting to explain these terms, agreed that training flights are customarily referred to as general proficiency flights or operational proficiency flights, but when asked whether the term "proficiency" meant "training in aerial flights," whether "proficiency" and "training and flying" are synonymous, he attempted to explain these

terms and finally ended up stating "they are very difficult things to try to explain to a layman when they are difficult to understand by pilots" (R. 162).

And respondent errs when it states that it is clear and apparently conceded by petitioners that an officer pilot of the Guard who is a civilian air technician, when flying an airplane on a training mission does so primarily in his military capacity (U.S. Brief 53). Petitioners concede that in order to fly the airplane, under National Guard Bureau and Air Force requirements the pilot requires a military pilot's license, but in flying the plane he does not necessarily perform military work and may, in fact, as the district courts found, and as petitioners claim, perform and carry out his maintenance supervisory work. Petitioners contend that the primary purpose of the flight was definitely not "a military training flight" as respondent contends (U. S. Brief 55), but for the purposes indicated by the testimony of the witnesses and the findings of the district courts which included at least, in part, the performance of McCoy's civilian maintenance duties.

If the Secretary of the Air Force, through the Chief of the National Guard Bureau, could delegate the authority to employ, fix rates of pay, establish work hours, supervise and discharge civilian caretakers, the federal government could withdraw that delegation of authority at any time and perform those functions itself. There can be no doubt that the federal government had and retained the right to control the civilian caretakers. The duties and responsibilities of the Aircraft Maintenance Chief, and of the Maintenance Supervisor, as prescribed by order of the Secretary of the Air Force, could not be changed or modified by state employees, nor could said civilian personnel be relieved of their said duties and responsibilities by any order originating at the state level, from a state official. The manual (ANGM 40-01) provided that its provisions "will govern all Air National Guard civilian employees" (Pltf's Ex. 3, R.

210) Appendix A-11, Brief on Behalf of Petitioners. It is evident that the *right to control* McCoy in his civilian maintenance work, and ultimate authority over him in that capacity, rested squarely with the Secretary of the Air Force and Chief, National Guard Bureau, despite any opinions to the contrary expressed by General Wilson when he gave his deposition as a witness for respondent. It is utterly unrealistic for the respondent to state that no federal officer could empower or supervise the flight (U. S. Brief 54), and, of course, the actual flying of the plane was not supervised by anyone except McCoy himself. His right to fly the aircraft was based upon the fact he had valid flying status orders issued by the United States Air Force for the purpose of flying frequent aerial flights (R. 302).

Respondent attempts to shift the emphasis from control of the pilot to "control of the flight." This does not change matters. Control of the flight as well as of the pilot is basically and ultimately in the United States, as the facts show. Under 32 USC Sec. 110, control is specifically retained by the federal government. Section 110 provides: "The President shall . . . issue orders, necessary to organize, discipline and govern the National Guard."

X.

As to Respondent's contentions that the certification and adjudication by departments of the United States that McCoy was a civil employee of the United States lacked probative weight.

The very significant acts and admissions of the United States following the occurrence showing that the United States regarded McCoy as its employee acting in the scope of his federal employment at the time of the occurrence are accorded only passing and limited reference in a foot-

note in respondent's brief, p. 55. But these admissions extended beyond those mentioned by respondent. Even if the admissions are not conclusive, it is a matter of the weight to be accorded to them, and that was a question for the trier of the facts, the United States District Court that heard and tried the case.

The accident occurred on May 20, 1958. On May 30, 1958, the "Employee's Notice of Injury or Occupational Disease" under the "Federal Employee's Compensation Act" was executed in behalf of McCoy (R. 224, 225). It disclosed that he was employed as an aircraft maintenance chief and was injured in the performance of his duties as the result of an aircraft collision which occurred while McCoy was piloting a jet airplane near Point of Rocks, Maryland. The Department of Labor, acting through William B. Wright, Legal Chief of the Subrogation Branch of the Solicitor's Office of the Department of Labor, wrote to McCoy and sent him an assignment agreement, and would not process his claim until he signed and returned the agreement to the department. The agreement (R. 227), executed pursuant to the provisions of 5 U. S. C. §776, prepared by the Department of Labor, recites that in consideration of payments made or to be made to McCoy by the United States under the Federal Employees' Compensation Act on account of the injuries sustained by him on May 20, 1958, "while employed as Aircraft Maintenance Chief (Pilot) by the Department of the Air Force" McCoy assigns to the United States any right he may have to claim damages against Capital Airlines or any other parties. On May 29, 1958, Lt. Col. Ebaugh, acting in his capacity as a Federal Official, the United States Property and Fiscal Officer, State of Maryland, certified with specific emphasis to the Department of Labor that McCoy:

"was working as a Civil Employee of the United

States at the time of the injury and *not* as a member of the Maryland National Guard." (R. 228)

Thereafter John M. Diggins, a Claims Examiner of the Bureau of Employees' Compensation, Department of Labor, and John J. Stasko, a Management Analyst for the Department of Labor, while acting as Claims Examiner Supervisor in the Bureau of Employees' Compensation which administers the Federal Employees' Compensation Act, whose duties were to oversee the adjudication of the claims arising out of the Federal Employees' Compensation Act, approved McCoy's claim under that statute as a claim sustained by a federal employee in the course of his employment (R. 186, 190, 191). The actual adjudication included a review of the basic forms submitted and a decision that McCoy was in the performance of duty at the time of injury. Robert J. Skahan, Chief of the Subrogation Branch, Office of the Solicitor, Department of Labor, testified that the claim of McCoy was handled and processed the same way all other claims were handled and processed involving employees of the United States injured in the line of duty (R. 17, 23, 24). Col. Ebaugh testified (R. 239) that he is the United States Property and Fiscal Officer for the State of Maryland, is charged with properly handling any federal moneys appropriated to the State of Maryland, that his office processed the permanent duty technician pay roll, maintained the records for those pay rolls, and that his office forwarded records pertaining to Air Technician employees, and processed such papers pertaining to McCoy. These were papers needed by the Bureau of Employees' Compensation in support of any claims in payment of hospitalization that might arise out of an injury. These forms included the individual's report of the accident or the circumstances surrounding the disability (C.A. Form 1), the immediate supervisor's statements (C.A. Form 2), and these were forms of a

general nature used in all instances for technicians. These forms, together with the request for hospitalization (C.A. Form 16), were transmitted to Col. Ebaugh by Col. Kilkowski, and Col. Ebaugh forwarded these forms together with his letter of transmittal to the department of Labor with the certificate he (Col. Ebaugh) executed, stating that McCoy was a civil employee of the United States at the time of injury and not a member of the Maryland National Guard. Col. Ebaugh, who had occupied his position with the federal government since 1955, stated that McCoy as a permanent air technician is a civilian employee and not a member of the Guard during the normal forty hour week (R. 242). After examining the forms submitted to him in connection with McCoy's claim, and the information contained in the forms, Ebaugh believed he was justified in filling out the certification as he did, and these were the forms used for Army and Air Technicians full-time technicians by his office (R. 244, 245).

After the compensation forms were submitted to the Department of Labor with Ebaugh's letter of transmittal, bills were received for hospitalization, and were forwarded to the Department of Labor for payment (R. 249). The Federal Employees' Compensation Act is applicable to all federal employees. It was part of Col. Ebaugh's duties as the United States Property and Fiscal Officer to certify, if it was the fact, that McCoy or any other technicians on "our pay roll" were qualified to apply for compensation. The certificate is required by the Department of Labor (R. 250, 251). When Ebaugh sent in the reports covering McCoy's claim, he knew McCoy had been injured while flying an airplane of the United States (R. 251).

If the Government contended at any time that Col. Ebaugh was mistaken and an error had occurred, the Government could have taken steps to rectify it. This has never been done. It cannot fairly be contended that the administrative award was made without proper con-

sideration of the facts. Mr. Stasko pointed out that all necessary forms were completed, including those required of both the employee and his immediate superior; that he (Stasko) had reviewed the claim of McCoy, in Stasko's position as claims examiner supervisor, and decided that McCoy was in the performance of his duty as an employee of the United States at the time of his injuries (R. 186, 190, 191). Subsequently, at respondent's request and pursuant to statute, McCoy executed an assignment to the United States of his rights against Capital Airlines and others (R. 225-227). No testimony was offered by respondent that a mistake or error was made by Col. Ebaugh or by the Department of Labor in certifying and approving the claim of McCoy for benefits under the Federal Employees' Compensation Act. These forms, including the certificate executed by Col. Ebaugh and the assignment executed by McCoy to the United States, are to be given due weight as records made in the normal course of business under the provisions of 28 U. S. C. §1732. *Pekelis* v. *Transcontinental & Western Air*, 187 F. 2d 122 (2 Cir. 1950), cert. den. 341 U.S. 951 (1951); *Moran* v. *Pittsburg-DesMoines Steel Co.*, 183 F. 2d 467 (3 Cir. 1950); *Quinones* v. *Tropical Beverages*, 74 Puerto Rico Rep. 338 (1953); *Little Fay Oil Company* v. *Stanley*, 90 Okla. 265, 217 P. 377 (1923); *Fitzgerald* v. *Lozier Motor Co.*, 187 Mich. 660, 154 N.W. 67 (1915).

The certificate prepared by Col. Ebaugh is an admission against interest on the part of the United States. *Chicago* v. *Greer*, 9 Wall 726, 19 L. ed. 769 (1870), 20 Am. Jur., *Evidence* § 603, p. 516 (perm. ed. 1939).

The fact that the United States took an assignment from McCoy is also further evidence that he was an employee of the Government at the time of the occurrence. *Pittsburg Construction Co.* v. *Gannon*, 46 App. D.C. 131 (1917). The certification of Col. Ebaugh as to McCoy's status at

the time of the occurrence, the subsequent payment of compensation benefits, and the assignment taken by the United States from McCoy, all must be taken as evidence tending to show that McCoy was an employee of the United States at the time of the occurrence. They are admissions and records made in the normal course of business. As stated in 4 Wigmore, *Evidence*, Para. 1073, p. 999 (3rd Ed., 1940), an employer's business record of an accident to an employee, if it is a statement by himself amounting to an admission, may be received as such irrespective of its satisfying the requirements applicable to business entries.

Respondent attempts to meet the effect of these significant admissions by federal officials that McCoy was injured while working as a civil employee of the United States by stating that the Court of Appeals properly ruled the admission "was not binding or conclusive," and respondent finally states that the admission "clearly had no probative weight . . ." (U. S. Brief 55, footnote 37).

XI.

As to respondent's contention that petitioners expressly disavowed collateral estoppel.

Respondent states that "petitioners expressly disavowed" any claim that "they were entitled to judgment because of the collateral estoppel effect of the *Meuer* judgments in either the district court or in the court of appeals until after the decision of the court of appeals" (U.S. Brief 56, 57). Petitioners did state on February 11, 1963, in making an application for leave to file copies of certain exhibits, that it did not, by making the application, "concede that the decision in the other cases are res adjudicata here." The language used by petitioners did not waive

any right to claim collateral estoppel then or at a future date. The judgment of the court of appeals in the *Meyer* cases entered on June 3, 1963, was called to the attention of the Third Circuit promptly thereafter. At no time have petitioners conceded, nor do they now concede, that any judgment in the *Meyer* cases can operate as res adjudicata against petitioners who were not a party to those proceedings and did not have an opportunity to be heard or offer evidence in those cases. It is not correct for respondent to advise this Court that "petitioners expressly disavowed" any right to claim collateral estoppel based upon the *Meyer* judgment in the district court and the court of appeals.

Conceivably, as respondent urges (U.S. Brief 57, 58), there are situations where it would not be just or equitable to apply the doctrine of collateral estoppel, as in the illustration given by respondent. But that illustration has no validity or application to the present cases which reach this Court in the following posture: three cases were tried together in the United States District Court for the District of Columbia, and at the request of the Government and by agreement of counsel, the issue of agency was tried first in a bench trial; the court conducted an exhaustive inquiry into the facts and the law before holding in favor of the claimants; the Court of Appeals for the District of Columbia Circuit upheld that decision in an unanimous opinion; and this Court denied the petition for a writ of certiorari. The Government surely cannot claim that it did not have its day in court, or that its rights were not fully protected in those judicial proceedings. Every element necessary for the application of the doctrine of collateral estoppel was present. The doctrine of collateral estoppel should be applied against a party who was present, had a full opportunity to be heard and present its defense and did so, and does not contend now that if another trial were held, it would have any new or different evidence to present.

Conclusion

Petitioners submit that the evidence demonstrated that McCoy was flying the airplane in the performance of his work and duties as maintenance supervisor of the 75 to 80 maintenance personnel employed as civilian caretakers of the United States military planes and all other federal property allocated to the unit; that he was performing the duties of the employment when flying the jet airplane involved in the occurrence, acting in the scope of his employment by the federal government under the Federal Tort Claims Act; that McCoy's employer, if a private person, would have been liable under the laws of Maryland for McCoy's negligent acts at the time and place in question.

Respectfully submitted,

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